TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 206.

THE OLD DOMINION COPPER MINING AND SMELTING COMPANY, PETITIONER,

vs.

FREDERICK LEWISOHN ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR CERTIORARI FILED JANUARY 10, 1907.
CERTIORARI AND RETURN FILED MARCH 11, 1907.

(20,538.)

(20,538.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

No. 206.

THE OLD DOMINION COPPER MINING AND SMELTING COMPANY, PETITIONER,

vs.

FREDERICK LEWISOHN ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

	Original.	Print.
Caption	*a*	1
Transcript from the circuit court of the United States for the southern district of New York	1	1
Subpœna	1	1
Amended bill of complaint	3	2
Exhibit A—Offer	31	18
B—Proposition	34	20
Demurrer to whole bill	36	21
Demurrer to part of bill	38	22
Opinion, Holt, J.	40	23
Order sustaining demurrer and dismissing bill of complaint	42	24
Judgment	44	24
Petition for appeal	45	25
Assignment of errors	47	26
Bond	49	27
Citation	51	29
Clerk's certificate	53	29
Opinion *per curiam*	54	30
Decree	57	32
Clerk's certificate	59	32
Writ of certiorari	60	33
Return on writ of certiorari	63	33
Stipulation as to return	64	34

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 26, 1907.

a United States Circuit Court of Appeals for the Second Circuit.

THE OLD DOMINION COPPER MINING AND SMELTING COMPANY,
Complainant-Appellant,
vs.
FREDERICK LEWISOHN ET AL., Defendants-Appellees.

Transcript of Record.

Appeal from the Circuit Court of the United States for the Southern District of New York.

[Stamped:] United States circuit court of appeals, second circuit. Filed Apr. 13, 1906. William Parkin, clerk.

1 The President of the United States of America to Frederick Lewisohn, Walter Lewisohn, Albert Lewisohn and Philip S. Henry, Greeting:

[L. S.]

You are hereby commanded that you and each of you personally appear before the Judges of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, in Equity, on the first Monday of February, A. D. 1903, wherever the said Court shall then be, to answer a bill of complaint exhibited against you in the said Court by The Old Dominion Copper Mining and Smelting Company, and do further and receive what the said Court shall have considered in that behalf. And this you are not to omit under the penalty on you and each of you of two hundred and fifty dollars.

Witness, The Honorable Melville W. Fuller, Chief Justice of the United States, at the Borough of Manhattan, in the City of New York, on the sixth day of January, in the year of our Lord one thousand nine hundred and three, and of the Independence of the United States of America the one hundred and twenty-seventh.

JOHN A. SHIELDS, *Clerk.*

BRANDEIS, DUNBAR & NUTTER,
CARTER, HUGHES & DWIGHT,
Solicitors for Complainant.

The defendants are required to enter appearance in the above cause, in the Clerk's office of this Court, on or before the first
2 Monday of February, 1903, or the bill will be taken *pro confesso* against them.

J. A. S., *Clerk.*

(Endorsed:) I hereby certify, That on the 6th day of January, 1903, at the City of New York, in my District, I personally served

the within Subpœna in Equity upon the within-named Defendants Frederick Lewisohn, Walter Lewisohn, Albert Lewisohn and Philip S. Henry by exhibiting to each of them the within original, and at the same time leaving with each of them a copy thereof. Wm. Henkel, United States Marshal, Southern District of New York.—Dated Jan. 6, 1903.—U. S. Circuit Court, Southern District New York.—Filed Jan. 6, 1903.—John A. Shields, Clerk.

3 Circuit Court of the United States, Southern District of New York.

In Equity. #8333.

OLD DOMINION COPPER MINING AND SMELTING COMPANY
vs.
FREDERICK LEWISOHN ET AL.

Amended Bill of Complaint.

To the Honorable the Judges of the Circuit Court of the United States for the Southern District of New York:

The Old Dominion Copper Mining and Smelting Company, a corporation duly organized under the laws of the State of New Jersey, and a citizen of said State, residing at Jersey City, in said State, and in the District of New Jersey, complainant, against Frederick Lewisohn, Walter Lewisohn, Albert Lewisohn and Philip S. Henry, all citizens of the State of New York, residing in the Borough of Manhattan, in the City of New York, in the State of New York, and in the Southern District of New York, as executors of the last will of Leonard Lewisohn, who, at the time of his death, was a citizen of said State, residing in said Borough of Manhattan, respondents.

4 And thereupon your orator complains and says:

First. The complainant, the Old Dominion Copper Mining and Smelting Company, is a corporation duly organized under the laws of the State of New Jersey, and having a usual place of business at Boston, in the County of Suffolk and Commonwealth of Massachusetts, and a citizen of New Jersey, residing at Jersey City, in said State and in the District of New Jersey. Said corporation is the owner of copper mines and smelting works in the Territory of Arizona, and is carrying on the business of mining, smelting and selling copper.

Second. On and prior to April 30, 1895, there existed a certain corporation called the Old Dominion Copper Company of Baltimore City (hereinafter called the Baltimore Old Dominion Company), organized under the laws of the State of Maryland, and having a usual place of business in said Baltimore. Said Baltimore Old Dominion Company was then the owner of mines and mining claims in Arizona. It had a capital stock of five hundred thousand (500,-

000) dollars, divided into twenty-five thousand (25,000) shares of the par value of twenty (20) dollars each. Of said shares there were then owned by the executors of the will of Michael H. Simpson, late of said Boston, deceased, about seventeen thousand eight hundred and fifty-seven (17,857) shares and the balance of said shares were then owned by one William Keyser, of Baltimore, in the State of Maryland. Said Keyser also then held the title in his own name to certain mining claims known as the Old Dominion Mine, the New York Mine, the Chicago Mine, the Keystone Mine, and a certain parcel of land near the Bloody Tanks, so-called, all in said Arizona. Said Keyser held said property for the benefit of himself and of the estate of said Michael H. Simpson.

5 Third. At some time prior to May 4, 1895, said Leonard Lewisohn, deceased, and one Albert S. Bigelow, of said Boston, formed the plan of acquiring all the stock of said Baltimore Old Dominion Company, as aforesaid, and of organizing a new corporation to acquire and of selling to such new corporation at a large advance in price all the property of said Baltimore Old Dominion Company, and in order to provide the same with a working capital of causing said new corporation to offer for subscription for cash to such of the public as might be induced to subscribe for the same a large number of the shares of such new corporation not previously issued in payment for said property, and of thereby securing for themselves and such persons as they might associate with them a large profit by such purchase and the subsequent sale to said new corporation to be organized by them of said property, and of obtaining from the subscribers for shares to be issued for cash the means of operating said mine; and said Leonard Lewisohn and said Bigelow thereupon conspired together to carry out said plan and thereby to injure said corporation to be formed as aforesaid and the future stockholders in said corporation and to secure for themselves as the promoters and organizers thereof a large secret profit.

Fourth. Thereafter, pursuant to said plan and conspiracy, said Leonard Lewisohn and said Bigelow at some time prior to May 24, 1895, procured an option to purchase from the executors of the will of said Michael H. Simpson said seventeen thousand eight hundred and fifty-seven (17,857) shares for seven hundred and fourteen thousand two hundred and eighty-five (714,285) dollars, and formed a syndicate known as the Old Dominion Syndicate, for the purpose of raising the money necessary to purchase said shares. Said

6 syndicate was formed in order, by purchasing said shares pursuant to said option, to carry out the plan and conspiracy of said Leonard Lewisohn and said Bigelow above described for the benefit of themselves and of such persons as might become members of said syndicate. Said Leonard Lewisohn and Bigelow, pursuant to said plan and conspiracy prior to May 24, 1895, induced a large number of persons to subscribe to and join said syndicate, upon the terms that the members of the syndicate should pay in fourteen (14) per cent. of the amount of their respective subscriptions or interests therein on May 27, 1895, twenty-eight and two-thirds (28 2/3) per cent. on July 26, 1895, twenty-eight and two-thirds (28 2/3) per

cent. on August 25, 1895, and twenty-eight and two-thirds (28 2/3) per cent. on September 24, 1896, and with each of said last three instalments five (5) per cent. interest thereon from May 27, 1895. It was understood and agreed between the members of said syndicate and said Leonard Lewisohn and Bigelow, and the intention in forming said syndicate was that the amounts so subscribed and paid in should be used so far as required for the purpose of acquiring the property or all or the greater part of the capital stock of said Baltimore Old Dominion Company and disposing of said property to a new corporation at a large advance in price and that the members of said syndicate should receive in cash or in stock of the new corporation to be formed to purchase said property as aforesaid the profit made by such sale to a new corporation *pro rata* according to their several subscriptions or interests.

Fifth. Thereafter, to wit, on or about May 27, 1895, said Leonard Lewisohn and said Bigelow received the first instalment, payable by the persons who up to that time had become members of said syndicate amounting to about one hundred thousand (100,000)
7 dollars. On or about May 28, 1895, said Bigelow, in behalf of himself and of said Leonard Lewisohn and of their associates in said Old Dominion Syndicate, and of such persons as might thereafter become associated with them in said syndicate, paid, in large part from the funds received from members of said syndicate other than said Bigelow and said Lewisohn, to the executors of the will of said Michael H. Simpson, in accordance with the terms of said option for the purchase of said seventeen thousand eight hundred and fifty-seven (17,857) shares of stock in said Baltimore Old Dominion Company the sum of one hundred thousand (100,000) dollars, and delivered to said executors three notes each for two hundred and four thousand seven hundred and sixty-one and 66/100 (204,761.66) dollars, all dated May 28, 1895, and payable sixty (60), ninety (90) and one hundred and twenty (120) days after date, respectively, made by said Leonard Lewisohn and endorsed by said Bigelow and by Lewisohn Brothers, a corporation. Said payment was made and said notes were made, endorsed and delivered in pursuance of and for the purpose of carrying out said original plan and conspiracy. Upon said payment and delivery of said notes all said shares of stock were deposited with the Old Colony Trust Company in said Boston, to be by it delivered upon payment of all said notes.

Sixth. On or about June 13, 1895, said Leonard Lewisohn and Bigelow, for the purpose of carrying out said plan and conspiracy, and for the purposes aforesaid of said syndicate, made an agreement with said William Keyser, whereby said Keyser undertook to sell to said Leonard Lewisohn and his associates seven thousand one hundred and forty-three (7,143) shares of stock in said Baltimore Old Dominion Company, being all the remainder
8 of the stock in said Baltimore Old Dominion Company, for two hundred and eighty-five thousand seven hundred and fifteen (285,715) dollars, payable forty thousand (40,000) dollars on June 20, 1895, and the balance by three promissory notes each for eighty-one thousand nine hundred and five (81,905)

dollars, payable thirty (30), sixty (60) and ninety (90) days after date, respectively, with the privilege of anticipating any payments. Said Keyser further agreed on payment of said cash and delivery of said notes to deposit all of said shares with the Old Colony Trust Company in said Boston, to be delivered upon final payment of all said notes. By said agreement said Keyser further undertook to convey to said Leonard Lewisohn or his order without any further consideration than the purchase of said stock all the interest of said Keyser, alleged to be one-half, in said Old Dominion Mine, Keystone Mine, New York Mine and Chicago Mine. Said agreement was made with the intention of providing the means for paying for said stock from the sums to be paid by subscribers to said Old Dominion Syndicate and of dealing with said stock in the same manner as with the stock of the Baltimore Old Dominion Company purchased from said executors. Thereafter, to provide the means of paying said Keyser for said stock, said Leonard Lewisohn and Bigelow induced a number of additional persons to subscribe to said syndicate and received from such subscribers to said syndicate further large sums for the first instalment payable on such subscriptions, and said Bigelow on or about June 20, 1895, in behalf of himself and of said Leonard Lewisohn and of their associates in said Old Dominion Syndicate and of such persons as might thereafter become associated with them in said syndicate, paid, in large part from the funds received from subscribers to said syndicate other than himself and said
9 Leonard Lewisohn, said sum of forty thousand (40,000) dollars and a further sum in anticipation of the first of said notes and delivered two other notes in conformity with said agreement, and said stock was deposited with said Old Colony Trust Company to be delivered as aforesaid. Said payment was made and said notes were made and delivered in pursuance of and for the purpose of carrying out said original plan and conspiracy.

Seventh. When said Leonard Lewisohn and Bigelow first obtained said agreement for the sale by the executors of the will of said Michael H. Simpson, they did not know that said four mining claims and said parcel of real estate were owned by said Keyser for the benefit of himself and said executors. Thereafter and on or about June 13th they learned that such was the case and formed the plan of securing said claims and parcel of real estate without the payment of any additional consideration and of selling the same for a large profit to the corporation to be formed to acquire the property of the Baltimore Old Dominion Company as above set forth. In pursuance of this plan and conspiracy they required said Keyser to undertake to convey said claims and real estate to them without payment of any additional consideration upon said executors assenting thereto. Thereafter, on or about June 14, 1895, they induced said executors to and said executors did agree that all interest of theirs in said four mining claims known as the Old Dominion, Keystone, New York and Chicago Mines and said parcel of land near the Bloody Tanks, legal title to all of which was then in said Keyser as above set forth, should be trans-

ferred without any further consideration than the purchase of said shares of stock from said executors.

Eighth. On or about June 20, 1895, a meeting of the
10 directors of the Baltimore Old Dominion Company was duly held at Baltimore. At said meeting two of the five directors of said corporation and the president and treasurer thereof resigned and their resignations were duly accepted. Said Bigelow and said Leonard Lewisohn were thereupon duly elected directors and duly elected president and treasurer, respectively, of said corporation, and the then remaining old directors tendered their resignations to take effect when desired by said Leonard Lewisohn and Bigelow. One Allen W. Evarts, an attorney employed by said Leonard Lewisohn and Bigelow, was also duly elected secretary of said corporation. At the same time, to wit, on or about June 20, 1895, said William Keyser, pursuant to his said agreement and the agreement of the executors of the will of said Michael H. Simpson and without the payment of any consideration other than the payment for the stock in said Baltimore Old Dominion Company purchased as aforesaid, conveyed and transferred to said Leonard Lewisohn said four mining claims known as the Old Dominion Mine, Keystone Mine, Chicago Mine and New York Mine, and said parcel of land near the Bloody Tanks, so called. Said conveyance was made to said Leonard Lewisohn and the title to said property was acquired by him for the common benefit of himself and said Bigelow, as hereinafter set forth, and as a part of the plan and conspiracy hereinbefore set forth.

Ninth. On or about July 8, 1895, said Leonard Lewisohn, in conjunction with said Bigelow, in pursuance of said plan and conspiracy and for the purpose of carrying out the same for the benefit of themselves and of the subscribers to said Old Dominion Syndicate, so-called, caused the Old Dominion Copper Mining and Smelting Company, the complainant herein, to be organized under the general corporation laws of the State of New Jersey.
11 Said corporation was formed by seven persons selected and employed for the purpose by said Leonard Lewisohn and said Bigelow, to wit, Jesse Lewisohn, Allen W. Evarts, Edgar Buffam, Charles W. Welch, Sidney Riddlestorffer, William V. Rowe and William R. Montgomery. None of said seven persons except said Jesse Lewisohn, who was a son of said Leonard Lewisohn, had any actual interest in said corporation or acted in the formation thereof otherwise than as the representative and agent of said Leonard Lewisohn and said Bigelow. Each of said individuals nominally subscribed and paid for four (4) shares of the capital stock of said corporation except said Jesse Lewisohn, who subscribed and paid for sixteen (16) shares; but in fact all said subscriptions were made for the benefit and at the request of said Leonard Lewisohn and said Bigelow, and each subscription was paid for by said Leonard Lewisohn and said Bigelow or by one of them.

Tenth. On July 9, 1895, the first meeting of said corporation, organized as aforesaid, was held in Jersey City, and all of said incorporators were then present. By-laws were adopted, and upon

an election of directors by ballot said seven incorporators above named were duly chosen directors. At said meeting it was further voted to increase the capital stock to three million seven hundred and fifty thousand (3,750,000) dollars, divided into one hundred and fifty thousand (150,000) shares of twenty-five (25) dollars each. A recess was taken by said meeting, and thereupon said seven directors met and organized and elected officers, to wit: Said Allen W. Evarts, president; said Sidney Riddlestorffer, vice-president; said Jesse Lewisohn, treasurer; and said Edgar Buffam, secretary.

12 Said meeting of directors confirmed the action of the prior meeting of incorporators increasing the capital stock, as above set forth. The organization of said corporation and the proceedings of said meetings of incorporators and directors were duly had according to the laws of the State of New Jersey, and the by-laws adopted, as aforesaid, and thereby the complainant became duly organized as a corporation and the individuals above named became the lawful officers of the corporation holding respectively the offices above named.

Eleventh. A meeting of the directors of said complainant corporation, organized as aforesaid, was duly held on July 11, 1895, at the office in New York City, of the corporation known as Lewisohn Brothers, of which corporation said Leonard Lewisohn was general manager; all of the directors except Montgomery were present. Pursuant to instructions from said Leonard Lewisohn and said Bigelow, the resignation of said Montgomery as a director was presented and duly accepted, and said Bigelow was thereupon chosen a director in his place. Thereupon, pursuant to instructions from said Leonard Lewisohn and said Bigelow, the successive resignations of said Rowe as a director, of said Welch as a director, of said Jesse Lewisohn as treasurer and director, of said Evarts as president, and of said Riddlestorffer as vice-president and as director were presented and duly accepted, and said Leonard Lewisohn, one Henry M. Whitney, one Thomas Nelson, and one Joseph G. Ray, were successively duly chosen directors, and said Thomas Nelson was duly chosen treasurer, and said Bigelow was duly chosen president of said corporation. Said Leonard Lewisohn and said Bigelow were present at said meeting, and upon their respective elections as directors took their places in said meeting. All said resignations were duly received and acted on and said elections

13 to fill the vacancies caused by said resignations were duly had pursuant to the laws of the State of New Jersey and the by-laws of said corporation.

Twelfth. At said meeting of the directors of the complainant corporation on July 11, 1895, above referred to, and after the several changes of directors and other officers by resignation above set forth, and after said Bigelow had been elected president of said corporation, there remained present four directors, to wit, said Leonard Lewisohn, said Bigelow, said Evarts and said Buffam. Said Evarts was the attorney employed by said Leonard Lewisohn and said Bigelow to attend to the incorporation of the complainant corporation and to carry out their said plan and conspiracy; said Buffam was a person

selected by them and employed by them to act as director and assist them in carrying out said plan and conspiracy. The remaining directors were said Thomas Nelson, Henry M. Whitney and Joseph G. Ray, no one of whom was present and each of whom was a subscriber to said Old Dominion Syndicate and interested to assist said Leonard Lewisohn and said Bigelow in their plan to sell said property to the complainant and in the success of said plan and conspiracy, and had been selected by them to fill said positions.

Thirteenth. On or about July 11, 1895, a meeting of the directors of the Baltimore Old Dominion Company was held at the office of said Lewisohn Brothers, in New York City. There were present said Leonard Lewisohn, said Bigelow and one R. Brent Keyser. On motion of said Leonard Lewisohn it was voted to make the complainant corporation the offer, a copy of which is marked "A" and attached to and made a part of this bill of complaint. Said Keyser acted at said meeting merely as a representative of said Leonard Lewisohn and said Bigelow, and voted in favor
14 of making said offer at their request and by their instructions. At said meeting of the directors of the complainant corporation on July 11, 1895, after the change of directors and officers above set forth and after said Bigelow had been chosen president and said Leonard Lewisohn treasurer as aforesaid, said Bigelow through said Evarts presented to said Board of Directors of the complainant said offer by the Baltimore Old Dominion Company to sell and convey to the complainant substantially all the property of said Baltimore Old Dominion Company, except the cash assets, for one hundred thousand (100,000) shares of the capital stock of the complainant corporation to be issued to said Baltimore Old Dominion Company or its nominees. Said offer was signed by said Bigelow as president of, and by said Evarts as secretary of said Baltimore Old Dominion Company. Upon presentation of said offer, on motion of said Leonard Lewisohn, seconded by said Evarts, it was unanimously voted to accept said offer and to issue one hundred thousand (100,000) shares of the capital stock in payment for said property, and said Bigelow and said Nelson were appointed a committee to supervise and carry out the details.

Fourteenth. Immediately after the passage of the vote last above referred to at said meeting of directors of the complainant on July 11, 1895, said Leonard Lewisohn presented to said Board of Directors of the complainant a proposition to sell and convey to the complainant said real estate in Arizona acquired by said Leonard Lewisohn from said William Keyser as above set forth, to wit, said Old Dominion Mine, said New York Mine, said Chicago Mine, said Keystone Mine, and said parcel of land near the Bloody Tanks, so called, for thirty thousand (30,000) shares of the capital stock of the complainant to be issued to said Leonard Lewi-
15 sohn or his nominees, accompanied with a request to issue said shares to said Bigelow and said Leonard Lewisohn. A copy of said proposition is hereto annexed and marked "B" and made a part of this bill of complaint. Upon presentation of said propo-

sition said Leonard Lewisohn and said Bigelow caused the directors of the complainant corporation then present unanimously to vote to accept said proposition and to issue thirty thousand (30,000) shares of the capital stock in payment for said property, and said Bigelow and said Nelson were appointed a committee to supervise and carry out the details.

Fifteenth. Thereafter, to wit, on or about July 18, 1895, said Leonard Lewisohn and said Bigelow, pursuant to the original plan and conspiracy, and for the purpose of furnishing the complainant corporation, promoted by them as aforesaid, with working capital and with funds required to develop its plants and other properties, caused said complainant corporation to offer for subscription and sale at the price of twenty-five (25) dollars per share twenty thousand (20,000) shares of capital stock of the complainant corporation remaining unissued and which had not been issued to or appropriated by said Leonard Lewisohn and Bigelow and their associates as payment for said properties. All of said twenty thousand (20,000) shares were so subscribed for and sold and the price of twenty-five (25) dollars per share paid therefor to the complainant by said subscribers. Said subscribers for said shares were ignorant at the time said shares were offered for subscription and at the times they severally subscribed and paid therefor and received their shares, as hereinafter set forth, of the facts hereinbefore set forth as to the promotion and organization of the complainant corporation by said Leonard Lewisohn and said Bigelow, and the large profit to
16 be made by said Leonard Lewisohn and said Bigelow and by the other members of said Old Dominion Syndicate therefrom and of the facts hereinbefore set forth concerning the acquisition of said four mining claims and parcel of real estate by said Leonard Lewisohn for the benefit of himself and of said Bigelow, and the acquisition thereof by said corporation and the issue of thirty thousand (30,000) shares of its capital stock therefor.

Sixteenth. The total subscriptions to the Old Dominion Syndicate amounted to one million (1,000,000) dollars, of which amount said Leonard Lewisohn contributed for his personal account about one hundred ninety-eight thousand nine hundred and twenty and fifty-five hundredths (198,920.55) dollars, and said Bigelow contributed for his personal account about fifty thousand (50,000) dollars. Payments of the deferred instalments on the subscriptions to said Syndicate were largely anticipated. The three notes payable to the executors of the will of Michael H. Simpson were paid—the note due July 27th on June 20th, the note due August 26th on July 1st, 1895, and the note due September 25th on July 8th, 1895. The two notes payable to William Keyser were paid—the note due August 26th on July 1st, 1895, and the note due September 25th on July 8th, 1895. All of these payments were made from the funds contributed by the members of said Syndicate or in part from such funds and in part from money advanced by said Lewisohn Brothers or by said Leonard Lewisohn for the purpose, and repaid from the funds of said Syndicate. On or about July 12th, 1895, possession of all of said mining property of said Baltimore Old Do-

minion Company, included in the offer marked Exhibit "A" and schedule thereto annexed, and of said four mining claims and said parcel of real estate included in the proposition of said
17 Leonard Lewisohn, marked Exhibit "B," was delivered to the complainant corporation, and thereafter said sales were consummated by delivery of deeds of conveyance of said several properties. Thereafter, to wit, on or about September 18, 1895, said Leonard Lewisohn and Bigelow caused the Board of Directors of the complainant corporation, at a meeting duly called, to vote to issue one hundred thousand (100,000) shares of the capital stock of this complainant to one Philip K. Dumaresq, the nominee of said Baltimore Old Dominion Company, as and for the price of said property so transferred and conveyed, and said shares were duly issued pursuant to said vote. And said Leonard Lewisohn and said Bigelow further caused said Board of Directors of this corporation at said meeting to vote to issue thirty thousand (30,000) shares of the capital stock of this corporation to said Leonard Lewisohn and said Bigelow as and for the price of said property transferred and conveyed by the latter to this corporation, as above set forth, and said shares were thereupon duly issued pursuant to said vote. And said Leonard Lewisohn and said Bigelow further caused said Board of Directors of this corporation at the same meeting to vote to issue the remaining twenty thousand (20,000) shares of the capital stock thereof to persons who had subscribed therefor, as above set forth, upon receiving payment of twenty-five (25) dollars per share therefor, and said shares were thereafter duly issued to said persons and paid for by them.

Seventeenth. Said property conveyed to the complainant by said Baltimore Old Dominion Company was at the time of such conveyance fairly worth not more than one million (1,000,000) dollars. Said parcels of real estate sold and conveyed by said Leonard Lewisohn to the complainant as aforesaid, to wit, said several
18 mining claims known as the Old Dominion Mine, New York Mine, Chicago Mine and Keystone Mine, respectively, and said parcel of land near the Bloody Tanks, so-called, were at the time of such conveyance together fairly worth not more than five thousand (5,000) dollars. Said Leonard Lewisohn and said Bigelow knew when they acquired the stock of said Baltimore Old Dominion Company as above set forth, and when the title to said parcels of real estate was conveyed to said Leonard Lewisohn as aforesaid, and when said offers to sell to the complainant were made in the name of said Baltimore Old Dominion Company and by said Leonard Lewisohn, respectively, that the value of the property referred to in said offers respectively was not in excess of the amounts above specified. The stock of said Baltimore Old Dominion Company and said parcels of real estate were acquired in the manner aforesaid with intent on the part of said Leonard Lewisohn and of said Bigelow to sell said property of said Baltimore Old Dominion Company and said parcels of real estate for a much larger price than the cost thereof to them. No disclosure was at any time made to the complainant corporation of the fact that said property and said real

estate were of values not greater than the values above given respectively, and by reason of the control by said Leonard Lewisohn and said Bigelow of the complainant corporation and of its Board of Directors, as above set forth, said purchases were made without any disclosures to or inquiry by the complainant corporation as to the reasonable value of said properties; and no disclosure was ever made to any of the persons who subscribed for or afterwards purchased shares of stock in the complainant corporation or to any other persons of the facts as to acquisition of said properties by said Leonard Lewisohn and said Bigelow and the purchase of said properties by the complainant corporation or as to the reasonable
19 value thereof, and said facts were not known to any of said persons or to any of the members of said Old Dominion Syndicate, except said Leonard Lewisohn and said Bigelow.

Eighteenth. By the transactions above set forth said Leonard Lewisohn and said Bigelow carried out their said plan and conspiracy, and having for the purpose of promoting a corporation and selling to such corporation at a price much in excess of the cost thereof, the property of said Baltimore Old Dominion Company and the property so conveyed to said Leonard Lewisohn, acquired all the capital stock of said Baltimore Old Dominion Company for the sum of one million (1,000,000) dollars, and acquired for the same consideration and without making any further payment, but for themselves, as they claimed, all the property conveyed by said Leonard Lewisohn to the complainant, and having promoted the complainant corporation and caused the same to be organized, thereupon did sell to it the property of said Baltimore Old Dominion Company for one hundred thousand (100,000) shares of the capital stock of this corporation of the par value of twenty-five (25) dollars each, to wit, the aggregate par value of two million five hundred thousand (2,500,000) dollars, and also sold to it all the property conveyed to said Leonard Lewisohn for thirty thousand (30,000) shares of said stock of the aggregate par value of seven hundred and fifty thousand (750,000) dollars. And for the purpose of providing the corporation so promoted and formed by them pursuant to and in execution of said plan and conspiracy, to wit, the complainant corporation, with working and other capital, said Leonard Lewisohn and said Bigelow in further execution and performance of said plan and conspiracy, caused the corporation so formed, to wit, the
20 complainant corporation immediately to offer the twenty thousand (20,000) shares of its capital stock then remaining unissued as aforesaid for subscription at twenty-five (25) dollars per share, and caused said corporation to issue said twenty thousand (20,000) shares to subscribers who were ignorant at the time they subscribed and at the time they paid therefor of the facts above set forth. The shares of this corporation so issued in payment for the property sold to it as aforesaid were at the time of the fair market value of twenty-five (25) dollars each, and continued for a long time thereafter to be of such or greater value, and said Leonard Lewisohn and said Bigelow thus made at the expense of the complainant corporation from the sale of the property conveyed by the

Baltimore Old Dominion Company to the complainant a profit of more than one million five hundred thousand (1,500,000) dollars, and in addition thereto made from the property conveyed by said Leonard Lewisohn to the complainant a profit of over seven hundred and fifty thousand (750,000) dollars.

Nineteenth. Said Leonard Lewisohn and said Bigelow allotted as a bonus or profit to the subscribers to said Old Dominion Syndicate to be divided among them in proportion to their respective subscription forty thousand (40,000) shares of the stock of the complainant corporation part of the one hundred thousand (100,000) shares received as payment for the property conveyed by the Baltimore Old Dominion Company, and further offered to each member of said syndicate the option of receiving without further payment a like number of additional shares part of said one hundred thousand (100,000) shares or the repayment in money of the amount of his original subscription. Substantially all the subscribers to said syndicate availed themselves of the option to take additional
21 shares and such shares, together with the shares first allotted to them, were transferred to them accordingly from said shares issued to said Dumaresq. To such few as elected to receive back in cash the amount of their subscription said Leonard Lewisohn and said Bigelow caused the complainant corporation to pay such amount in cash from the funds of the complainant corporation and the corresponding shares not taken were transferred to persons who paid cash therefor to the corporation to the amount of the par value thereof. Of the one hundred thousand (100,000) shares of the capital stock of this corporation issued to said Dumaresq, as above set forth, upon and as consideration for the conveyance of all the property of said Baltimore Old Dominion Company, as aforesaid, eighty thousand (80,000) shares were thus distributed to and among or for the account of the members of said Old Dominion Syndicate, so called. Of this amount one-half was a profit made in the manner above described, and said syndicate thereby made a profit of not less than one million ($1,000,000) dollars. Of the eighty thousand (80,000) shares thus divided said Bigelow received as his proportion four thousand (4,000) shares and said Leonard Lewisohn for himself and other members of the syndicate operating through him received thirty-six thousand one hundred and ninety (36,190) shares, of which about sixteen thousand (16,000) were retained for his personal account. Not less than one-half of the shares so issued direct to said Bigelow and of the shares issued to and retained by said Leonard Lewisohn represented and was a profit to them respectively as members of said syndicate from the purchase of the stock of said Baltimore Old Dominion Company and the sale of its property as aforesaid, to this corporation pursuant to the plan and conspiracy formed by said Bigelow and said Leonard Lewisohn as hereinbefore set forth.

22 Twentieth. Said Leonard Lewisohn and said Bigelow by agreement between themselves, and as the complainant is informed and believes, without the knowledge or assent of the other members of said Old Dominion Syndicate, or of the subscribers for

the twenty thousand (20,000) shares of stock issued by the complainant corporation, took from the one hundred thousand (100,000) shares issued to said Dumaresq, as above set forth, and ostensibly in payment of expenses and their own services in connection with the transaction, the twenty thousand (20,000) shares remaining after dividing eighty thousand (80,000) shares among the members of said syndicate, as above set forth. The expenses actually incurred by them did not exceed six thousand (6,000) dollars. These twenty thousand (20,000) shares were divided between said Lewisohn and said Bigelow, said Bigelow receiving ten thousand nine hundred and forty (10,940) shares as his proportion thereof, and said Leonard Lewisohn nine thousand and sixty (9,060) shares as his proportion thereof. Said thirty thousand (30,000) shares issued to said Leonard Lewisohn and said Bigelow for said conveyance of real estate by said Leonard Lewisohn were also divided between said Leonard Lewisohn and said Bigelow, said Bigelow receiving sixteen thousand four hundred and ten (16,410) shares thereof, and said Leonard Lewisohn thirteen thousand five hundred and ninety (13,590) shares.

Twenty-first. Prior to the formation of said Old Dominion Syndicate, so-called, and prior to obtaining said option for and making the several agreements hereinbefore referred to for the acquisition of the stock of said Baltimore Old Dominion Company, said Leonard Lewisohn and said Bigelow had formed the plan and intention of organizing a corporation to acquire the property of said Bal-
23 timore Old Dominion Company, and had formed the plan and intention of selling said property to such new corporation at a large advance in price, and of thereby acquiring and obtaining for themselves and such persons as they might associate with them a large profit from such sale to said corporation so to be formed, and of causing said corporation to retain and forthwith to offer for subscription to persons who might be willing to subscribe and pay therefor, a sufficient number of shares in the corporation so formed to provide said corporation with a working capital. And said Lewisohn and said Bigelow formed said Old Dominion Syndicate, so-called, in order to provide the money with which to carry out said plans, and purchased said stock of said Baltimore Old Dominion Company, for the purpose and with the intent of carrying out the prior plan and intention so formed by them as aforesaid, and of selling to the complainant corporation when the same should be formed the property of said Baltimore Old Dominion Company at a large advance in price; and said Leonard Lewisohn, and said Bigelow made this agreement for the acquisition and for the conveyance to said Leonard Lewisohn of said four mining claims and parcel of real estate with the purpose and intention of selling said mining claims and parcel of real estate to a corporation to be formed by them for the purposes above set forth, and of taking to themselves a large profit from such sale and with the intention of causing such corporation to retain and offer for subscription as above set forth a large number of shares of its stock; and said Leonard Lewisohn and said Bigelow caused the complainant corporation to be

organized and to acquire the property of said Baltimore Old Dominion Company, and to acquire the mining claims and real estate conveyed by said Keyser to said Leonard Lewisohn as above
24 set forth, and caused said corporation immediately to offer the twenty thousand (20,000) shares of its capital stock remaining unissued after said purchases as aforesaid for subscription to persons who might be willing to subscribe and pay therefor, in order to provide said corporation with working capital, in the manner aforesaid, all in further execution and performance of said plans and intentions. When said offer was made by said Baltimore Old Dominion Co. to the complainant corporation, and when said proposition was made by said Leonard Lewisohn to the complainant corporation, and when said offer and propositions were accepted, said Leonard Lewisohn and said Bigelow were in absolute control of the complainant corporation through the ownership by them and their associates of all stock in said complainant corporation then outstanding, and through the selection of a board of directors and other officers chosen by them and selected for the purpose of enabling them to carry out said plan, and consisting of themselves, their employees and associates, all of whom were expressly chosen for the purpose of carrying out said plan and intention, and had expressly undertaken to do so; and said offer of said Baltimore Old Dominion Company and said proposition of said Leonard Lewisohn were accepted by the complainant corporation through its Board of Directors, as above set forth, by the direction of said Leonard Lewisohn and said Bigelow, and the other directors in acting thereon acted solely at the direction of and pursuant to previous agreement with said Leonard Lewisohn and said Bigelow, and for the express purpose of carrying out the said plan and intention of said Leonard Lewisohn and said Bigelow, and all of said action was taken and was intended by the individuals who took part therein to carry out said plan and intention and to enable said Leonard Lewisohn and said Bige-
25 low and such persons as they had associated with them to make a large profit by the sale of said property of the Baltimore Old Dominion Company, and of said mining claims and real estate to the complainant corporation at a price greatly in excess of the cost to said Leonard Lewisohn and to said Bigelow and their associates of all the stock of said Baltimore Old Dominion Company and of said mining claims and real estate. And when said twenty thousand (20,000) shares of stock remaining unissued after said purchases as aforesaid were offered for subscription as aforesaid and were issued and sold to the subscribers therefor, as above set forth, said Leonard Lewisohn and said Bigelow were in absolute control of the complainant corporation, as aforesaid, and said shares were so offered for subscription and issued and sold in order to carry out said plan and conspiracy of said Leonard Lewisohn and said Bigelow aforesaid.

Twenty-second. From July 11, 1895, when said purchase in behalf of the complainant corporation of the property of said Baltimore Old Dominion Company and of said mining claims and real estate from said Leonard Lewisohn was consummated, as above set forth, until April 4, 1902, said Bigelow was continuously the presi-

dent and chief executive officer of the complainant corporation; throughout said period the Board of Directors of the complainant corporation was continuously composed of persons selected by said Leonard Lewisohn and said Bigelow, and at all times until April 4, 1902, a large majority of the persons so acting as directors were personal friends of said Leonard Lewisohn and said Bigelow, and had been interested with said Leonard Lewisohn and said Bigelow in the transactions above set forth and had received some share in the profits thereof, and the remaining directors took no active part
26 in the management of the complainant corporation and were ignorant of the facts hereinbefore set forth. No disclosure was at any time made to any of the subscribers for the twenty thousand (20,000) shares of the capital stock offered for subscription as aforesaid or to any purchasers of said shares of the capital stock of the complainant corporation or to the other members of the Old Dominion Syndicate or to any subsequent purchasers of the shares issued to said Dumaresq or to said Leonard Lewisohn and said Bigelow, and none of said persons in fact knew of the profits made by said Leonard Lewisohn and said Bigelow, from the division between them of said additional twenty thousand (20,000) shares part of the one hundred thousand (100,000) shares issued for the purchase of the property formerly held by the Baltimore Old Dominion Company from the division between them of the thirty thousand (30,000) shares derived from the sale of the property conveyed by said Leonard Lewisohn, as above set forth. This complainant had not until after April 4, 1902, any knowledge or information of any of the facts hereinbefore set forth as to the profit derived by said Leonard Lewisohn and said Bigelow or said Leonard Lewisohn in the manner above stated as promoters of this corporation, or of any profit having been derived by them, or either of them, or by any other person interested or participating in the promotion and organization of this corporation, and immediately upon receiving information relating thereto, the complainant investigated the same, and thereupon promptly made demand upon said Bigelow and upon the defendants.

Twenty-third. The property conveyed to the complainant by the Baltimore Old Dominion Company, as above set forth, consists mainly of the copper mine which was then and ever since
27 has been in active operation, and from which large amounts of ore have since been taken, and upon which large expenditures have been made in the development and establishment of the necessary plant. All the property so conveyed at the time it was sold to the complainant as above set forth was worth not over one million (1,000,000) dollars. The property conveyed to the complainant *by* Leonard Lewisohn as above set forth consisted merely of mining claims and a parcel of land for a mill site, all of which property has since said conveyance remained undeveloped and is now in substantially the same condition that it was in at the time of the conveyance by said Lewisohn to the complainant. Said property so conveyed was at the time of such conveyance fairly worth not more than five thousand (5,000) dollars.

Twenty-fourth. Said Leonard Lewisohn died on March 5, 1902,

and was at the time of his death a citizen of the State of New York and a resident of the Borough of Manhattan in the City, County and State of New York. On or about April 4, 1902, the last will and testament of said Leonard Lewisohn was duly admitted to probate in the Surrogate's Court for said County of New York, and on or about April 5, 1902, the respondents herein were duly appointed executors of said will, and letters testamentary were duly issued to them as such by said Surrogate's Court, and they are now such executors and duly qualified and acting as such. All said respondents are citizens of the State of New York and reside in the Borough of Manhattan in the City of New York and State of New York and in the Southern District of New York.

Twenty-fifth. After April 4, 1902, and prior to July 24, 1902, the complainant made investigation as to the matters above set
28 forth. In the course of such investigation it applied to said Bigelow for information and access to papers. This information was, as the complainant is informed and believes, referred to the respondents, and said Bigelow subsequently notified this complainant that the respondents were unwilling to permit information or access to papers relating to said matters to be given to the complainant. Thereafter, to wit, on or about July 24, 1902, the complainant by its counsel notified the respondents that the complainant had a claim for a very large amount against them as executors as aforesaid to recover the profits made by said Leonard Lewisohn as above set forth. Thereafter, to wit, on or about August 1, 1902, said respondents informed the complainant's counsel that they believed the claim of the complainant to be absolutely unfounded.

Thereafter, to wit, on or about September 12, 1902, the complainant offered to said Bigelow and to the respondents to rescind the sale and conveyance to it from said Leonard Lewisohn of said parcels of real estate in Arizona, to wit, the parcels known as The Old Dominion Mine, New York Mine, Chicago Mine, Keystone Mine and parcel of real estate near the Bloody Tanks, so-called.

Thereafter, to wit, on or about September 18, 1902, said complainant submitted to the counsel for the respondents a full statement of the claim contained in the bill of complaint, and on September 26, 1902, said counsel for the respondents notified the complainant that after a full investigation the respondents believed and counsel had so advised them, that the claims made upon them were not valid.

Twenty-sixth. The complainant desires to rescind the sale of said parcels of real estate conveyed to it by said Leonard Lewisohn as hereinbefore set forth, and has offered to convey all said par-
29 cels of real estate conveyed to it by said Leonard Lewisohn, to wit, said parcels known as the Old Dominion Mine, New York Mine, Chicago Mine, Keystone Mine and parcel of land near the Bloody Tanks, so-called, to said respondents or to such persons as they might name upon receiving from them the consideration paid by this complainant for the conveyance thereof to it, to wit, thirty thousand (30,000) shares of its capital stock, or upon a proper accounting for said shares, but said respondents have refused to make

any such restitution or accounting; and the complainant is still ready and willing, and hereby offers to convey said last named parcels of real estate to such persons as this Honorable Court may direct. Said Bigelow is a citizen and resident of Boston in the Commonwealth of Massachusetts and cannot be served with process in this District or in the State of New York. The complainant does not in this suit seek any relief as to sale to it of the property of the Baltimore Old Dominion Company or the issue of one hundred thousand (100,000) shares of its capital stock in payment therefor as above set forth or as to any profit made by said Leonard Lewisohn and by said Bigelow or by any other person from such sale, and disclaims all right to any such relief in this suit, having brought a separate suit for the purpose of obtaining such relief.

Twenty-seventh. The complainant says that the shares which it seeks to recover are of great value, to wit, greatly in excess of two thousand (2,000) dollars, and that the sum recoverable upon an accounting therefor is very large, to wit, greatly in excess of two thousand (2,000) dollars, exclusive in each case of interest and costs.

30 Wherefore the complainant prays:

1. That this Honorable Court will declare said sale of said parcels of real estate conveyed by said Leonard Lewisohn to the complainant as hereinbefore set forth, rescinded, and will direct this complainant upon the return to it of or a proper accounting to it for the consideration for said sale and conveyance, to execute such reconveyance, if any, of said several parcels of real estate to such person or persons as this Honorable Court shall think proper.

2. That said respondents in their capacity of executors of the will of said Leonard Lewisohn be required to return to the complainant the consideration paid by this complainant for said conveyance, to wit, thirty thousand (30,000) shares of its capital stock, or if, and so far as said shares are no longer in their control, to account to the complainant therefor.

3. In the alternative, in case this Honorable Court shall deem that the complainant has not rescinded and is not entitled to rescind said sale or conveyance of said parcels of real estate conveyed by said Leonard Lewisohn to the complainant as above set forth, that this Honorable Court will ascertain the amount of damages suffered by the complainant by reason of the sale of said parcels of real estate as above set forth, and will by its decree establish the right of the complainant to recover said amount and order said respondents in their capacity of executors of the will of the said Leonard Lewisohn to pay said amount to it.

4. For such other relief as to this Honorable Court shall seem meet.

And may it please your Honors to grant unto the complain-
31 ant a writ of *subpœna ad respondendum* directed to said respondents Frederick Lewisohn, Walter Lewisohn, Albert Lewisohn, and Philip S. Henry, commanding them each to be and appear in this Honorable Court on a day certain therein to be named to answer this bill of complaint but not under oath, an answer under

oath being specially waived, and to abide by and perform such orders and decrees as may be made herein.

OLD DOMINION COPPER MINING
AND SMELTING COMPANY,
By BRANDEIS, DUNBAR & NUTTER,
Its Solicitors.

LOUIS D. BRANDEIS.
CHARLES E. HUGHES.

(EXHIBIT.)

A.

To the Old Dominion Copper Mining & Smelting Company, a corporation, organized and existing under the laws of the State of New Jersey:

The Old Dominion Copper Company of Baltimore City, a corporation organized and existing under the laws of the State of Maryland being the owner of certain mines and mining properties at Globe in the Territory of Arizona, described in the annexed Schedule and of machinery, lumber, wood, tools, implements and other personal property for use for and in connection with the operation and maintenance thereof hereby makes the following proposition. To convey, assign and transfer all its property, both real and personal of every kind and nature whatsoever and wheresoever situated by good and sufficient deeds and instruments properly executed so as to confer absolute title thereto to the Old Dominion Copper Min-
32 ing and Smelting Company upon receiving from said Company one Hundred thousand shares of its capital stock to be issued to said Old Dominion Copper Company or to its nominees.

It being understood that the Old Dominion Copper Mining and Smelting Company shall assume all obligations of The Old Dominion Copper Company of Baltimore City incurred since the first day of June, 1895, and shall be entitled to all earnings and profits of said Company since that date.

July 11th, 1895.

A. S. BIGELOW, *President.*

A. W. EVARTS, *Secretary.*

(EXHIBIT.)

SCHEDULE.

First. The Globe Mine, patented by the United States Government to B. W. Reagan on the 18th day of October, 1881, by patent recorded in the office of the Recorder of Pinal County, Territory of Arizona on the 19th day of November, 1881, to which record reference is made for a fuller description of said mine.

Second. The Globe Ledge Mine, patented by the United States Government to Benjamin W. Reagan on the eighteenth day of October, 1881, by patent recorded in the office of the Recorder of Pinal County, Territory of Arizona, on the nineteenth day of November, 1881, to which record reference is made for a fuller description of said Mine.

Third. The Copper Jack Mill site of which the location is recorded in the office of the Recorder of Gila County, Arizona, in Book 2, of the Record of Mines at page 311, and to which record reference is hereby made for a fuller description of said Mill Site, and upon which the Smelting Works, formerly owned by the old Dominion Copper Mining Co., are situated.

33 Fourth. The Globe Mill Site, of which the location notice is recorded in the office of the Recorder of Gila County, Arizona, in Book 2 of Records of Mines at page 311, to which record reference is hereby made for a fuller description of said Mill Site.

Fifth. The Globe Ledge Mill Site, of which the location notice is recorded in the office of the Recorder of Gila County, Arizona, in Book 2 of Records of Mines at page 310, to which record reference is hereby made for a description of said Mill Site.

Sixth. The Southeast Globe Mine, of which the location notice is recorded in the office of the Recorder of Gila County, Arizona, in Book 2 of Records of Mines, at page 312, and reference is hereby made to said report for a fuller description of said Mine.

Seventh. All of the certain Mining claim known as the Interloper in Globe District Records on pages 116 and 117 in Book 3, reference to which will more fully show, being the same property conveyed to William Keyser by Thomas H. Mason, by deed bearing date January 3rd, 1887, and recorded at page 586, Book 2, record of deeds to Mines, Gila County, Arizona Territory.

Eighth. The Fraction Mine of which the location notice is recorded in the office of the Recorder of Gila County, Arizona, in Book 2, of Records of Mines at page 569, to which record reference is hereby made for a fuller description of said mine.

Ninth. The Alice Mine or lode, located October 10th, 1875, by A. R. Hammond and J. W. Reed and notice of location recorded in Book 1, page 131, Globe District Mining Records (now part of the Records of Gila County) and relocated February 28th, 1879,

34 and notice of location recorded in Book 5, Globe District Mining Records (now a part of the Records of Gila County) on pages 184 and 185, said Mine or *Load* being more particularly described in the last mentioned notice of location as follows, to wit: Commencing at this monument of stones in a gulch, being the centre of southwest end of claim, and upon which this notice is posted, thence southeast, 300 feet to a monument of stones, thence northeast, 1,400 feet to a monument of stones, thence northwest 300 feet to a monument of stones, being the centre of the northeast end of claim, thence northwest 300 feet to a monument of stones, thence southwest 1,400 feet to a monument of stones, under a tree, thence southeast 300 feet to the place of beginning, being the same mining claim conveyed to Michael H. Simpson, deceased, by deed of the Globe City

Mining Company dated July 1st, 1884, and recorded with Gila County Deeds to Mines, Book 2, page 227 *et seq.*

Tenth. The Mining Claim called and known as Hypathia Mine, situated, lying and being in Globe Mining District, Gila County, Territory of Arizona, and more particularly described in the notice of location recorded at page 66, Book 2, Records of Mines, Gila County, Records, to which record reference is made for a more definite description of said mine. Said mine was formerly known as the Southwest Alice Mine, being the same mining claim conveyed to said Michael H. Simpson, lately deceased, by deed of William H. Cook, dated November 18th, 1884, and recorded with Gila County Deeds, Book 2, page 305.

B.

To the Old Dominion Copper Mining and Smelting Company:

I hereby offer to convey the following described property now owned and held by me upon receiving thirty thousand shares of the capital stock of the Old Dominion Copper Mining and Smelting Company to be issued to me or to my nominees.

(EXHIBIT.)

First. The Old Dominion Mine entered by the Old Dominion Copper Mining Company on the 17th day of December, 1883, in the United States Land Office at Tucson, Arizona, Entry No. 267, Lot 45, situated in Globe Mining District, Gila County, Arizona.

Second. The New York Mine entered by the Old Dominion Copper Mining Company on the 17th day of December, 1883, in the United States Land Office at Tucson, Arizona, Entry 268, Lot 46, in Globe Mining District in Gila County, Arizona.

Third. The Chicago Mine entered by the Old Dominion Copper Mining Company on the 17th day of December, 1883, in the United States Land Office at Tucson, Arizona, Entry 269, Lot 51, in Globe Mining District, Gila County, Arizona.

Fourth. The Keystone Mine entered by the Old Dominion Copper Mining Company on the 17th day of December, 1885, in the United States Land Office at Tucson, Arizona, Entry 384, Lot 54, in Globe Mining District, Gila County, of Arizona.

Fifth. A lot or parcel of land situated near the Bloody Tanks, and deeded by E. A. Saxe to the Old Dominion Copper Mining Co., deed recorded in Book 1 of Deeds to real estate at Arizona, and reference is hereby made to said record for a fuller description of said parcel of land.

New York, July 11, 1895.

LEONARD LEWISOHN.

Please issue said thirty thousand shares of stock to Mr. A. S. Bigelow and myself.

LEONARD LEWISOHN.

36 Circuit Court of the United States, Southern District of New York. In Equity.

OLD DOMINION COPPER MINING AND SMELTING COMPANY
vs.
FREDERICK LEWISOHN ET AL.

Defendants' Demurrer to the Whole Bill.

The joint and several demurrer of Frederick Lewisohn, Walter Lewisohn, Albert Lewisohn and Philip S. Henry, as Executors of the Last Will of Leonard Lewisohn, the defendants above-named.

These defendants respectively by protestation, not confessing or acknowledging all or any of the matters and things in the said plaintiff's bill to be true, in such manner and form as the same are therein set forth and alleged, demur thereto, and for cause of demurrer show:

1. That the complainant has not, in and by said bill, stated such a case as entitles it to any relief against the defendants.

2. That it appears by said bill that the same sets up against the defendants different and distinct causes which are inconsistent with each other and cannot properly be joined; that different re-
37 liefs inconsistent with each other are prayed for, and that the said bill is altogether multifarious.

Wherefore and for divers other good causes of demurrer appearing in the said bill these defendants respectively demur thereto and humbly demand the judgment of this Court whether they shall be compelled to make any further or other answer to the said bill, and pray to be hence dismissed with their costs and charges in this behalf wrongfully sustained.

HOADLY, LAUTERBACH & JOHNSON,
Solicitors for the Defendants.

STATE OF NEW YORK, *County of New York, ss:*

Frederick Lewisohn makes solemn oath, and says, that he is one of the above-named defendants, and that the foregoing demurrer is not interposed for delay, and that the same is true in point of fact.

FREDERICK LEWISOHN.

Subscribed and sworn to before me this 5th day of May, 1905.

[SEAL.] ERNEST W. BROWN,
Notary Public, N. Y. County.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

EDWARD LAUTERBACH,
Of Counsel for Defendants.

38 Circuit Court of the United States, Southern District of New York. In Equity.

OLD DOMINION COPPER MINING AND SMELTING COMPANY
vs.
FREDERICK LEWISOHN ET AL.

Defendants' Demurrer to a Part of the Bill.

The defendants by protestation, not confessing or acknowledging all or any of the matters and things in the plaintiff's bill of complaint to be true in such manner and form as the same are therein set forth and alleged, and not waiving his demurrer to the whole bill, but insisting and relying thereon, further demur to so much of said bill as seeks to have the sale of certain parcels of real estate conveyed to the plaintiff by Leonard Lewisohn rescinded, and to have the defendants ordered to return to the plaintiff the consideration paid by the plaintiff for said conveyance; and for causes of demurrer the defendants show:

I. That the complainant has not, in and by said bill, stated such a case as entitles it to the aforesaid relief against the defendants.

II. That it appears by said bill that one Albert S. Bigelow therein referred to is an indispensable party defendant to said bill so far as it seeks the rescission of the aforesaid sale, but that he has not been made a party defendant.

39 Wherefore, the defendants demur to so much of the complainant's bill as is above specified, and demand judgment of this court, whether he shall make any further or other answer to such part of said bill as is so demurred unto as aforesaid, and prays to be hence dismissed with their costs in this behalf sustained.

HOADLY, LAUTERBACH & JOHNSON,
Solicitors for the Defendants.

STATE OF NEW YORK, *County of New York, ss:*

Frederick Lewisohn makes solemn oath, and says, that he is one of the above-named defendants, and that the foregoing demurrer is not interposed for delay, and that the same is true in point of fact.

FREDERICK LEWISOHN.

Subscribed and sworn to before me this 5th day of May, 1905.

ERNEST W. BROWN,
[SEAL.] *Notary Public, N. Y. County.*

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

EDWARD LAUTERBACH,
Of Counsel for Defendants.

40 United States Circuit Court, Southern District of New York.

THE OLD DOMINION COPPER MINING AND SMELTING COMPANY,
Complainant,
against
FREDERICK LEWISOHN ET AL., Defendants.

Carter, Hughes & Dwight and Brandeis, Dunbar & Nutter (Louis D. Brandeis, Charles E. Hughes and William H. Dunbar, of counsel), for plaintiff.

Hoadly, Lauterbach & Johnson (Edward Lauterbach, Eugene Treadwell, and Henry Siegrist, Jr., of counsel), for defendants.

HOLT, *J.:*

Orderly practice requires that a decision made by a judge in a case should be followed by another judge, upon any question arising in that case, unless the facts presented are different. Judge Lacombe having held that the original complaint in this action was bad on demurrer, the question whether the amended complaint is bad on demurrer depends upon the question whether it presents a different case. The complainant's counsel claim that a substantial change has been made in the bill by amendments alleging more clearly than was alleged in the original bill that the 20,000 shares of stock
41 sold to the subscribers for cash were sold by the corporation, and not by Bigelow and Lewisohn. But, in my opinion, the original bill clearly alleged that fact in paragraphs 15 and 21, and in other parts of the bill. Under these circumstances, I can see no substantial difference between the amended bill and the original bill, and, without expressing any opinion on the question in respect to which it is claimed that Judge Lacombe and the Supreme Court of Massachusetts differ, I think that, as the amended bill alleges substantially the same cause of action as the original bill, Judge Lacombe's decision governs the case.

My conclusion is that the demurrer should be sustained, with costs; and, as the complainant has been permitted to amend the bill to meet the precise point of objection stated in Judge Lacombe's decision, I think that final judgment should be ordered on the demurrer for the defendants.

Nov. 11, 1905.

G. C. H.

(Endorsed:) United States Circuit Court, Southern District of New York.—The Old Dominion Copper Mining and Smelting Company, Complainant, against Frederick Lewisohn, *et al.*, Defendant-.—Memorandum. Holt, J.—U. S. Circuit Court, Southern District, New York.—Filed Nov. 11, 1905.—John A. Shields, Clerk.

42 At a Stated Term of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, held at the United States Court Rooms, in the

Borough of Manhattan, City of New York, on the 18th day of November, in the year of our Lord, one thousand nine hundred and five.

Present: Hon. George C. Holt, Judge.

THE OLD DOMINION COPPER MINING AND SMELTING COMPANY,
Complainant,
against
FREDERICK LEWISOHN ET AL., Defendants.

The demurrers of the defendants to a part of the amended bill of complaint, and to the whole of the amended bill of complaint, having duly come on for hearing, and after hearing Eugene Treadwell, Esq., of counsel for the defendants, in support of the demurrers, and William H. Dunbar, Esq., and Louis D. Brandeis, Esq., of counsel for the complainant, in opposition thereto, and the premises having been duly considered, it is

Ordered by the Court, that the demurrer to the whole of said amended bill of complaint for want of equity, be, and the same is hereby, sustained, and the complainant having heretofore
43 been permitted to amend the bill of complaint to meet the prior decision of this Court sustaining a demurrer herein and dismissing the bill of complaint, it is

Further ordered by the Court, that the said bill of complaint be, and the same hereby is dismissed; and it is

Further ordered that the defendants do recover against the said complainant their costs and charges by them incurred upon the said demurrer, to be taxed, and that the said defendants have execution therefor.

GEO. C. HOLT, *J.*

(Endorsed:) United States Circuit Court, Southern Dist. of New York.—The Old Dominion Copper Mining and Smelting Company, Complainant, *vs.* Frederick Lewisohn, *et al.* Def'ts.—Order.—Hoadly, Lauterbach & Johnson Sol'rs for Def'ts, 22 William Street, New York City.—Copy Received Nov. 13, 1905.—Carter, Hughes & Dwight.—U. S. Circuit Court, Southern District New York.—Filed Nov. 18, 1905.—John A. Shields, Clerk.

44 United States Circuit Court, Southern District of New York.

THE OLD DOMINION COPPER MINING AND SMELTING COMPANY,
Complainant,
against
FREDERICK LEWISOHN ET AL., Defendants.

This cause having been regularly brought on for trial upon the issues of law formed by complainant's amended complaint, and the demurrers of the defendants to a part of the amended bill of complaint, and to the whole of the amended bill of complaint, at a Term

of this Court, held by the Hon. George C. Holt, one of the Judges of this Court, who, having heard the parties by their counsel, and after due deliberation, has duly made and filed his decision, and an order having been duly made and entered herein and filed in the office of the Clerk of this Court on the 18th day of November, 1905, directing that the demurrer to the whole of said amended bill of complaint for want of equity be sustained and that the bill of complaint herein be dismissed, the complainant having heretofore been permitted to amend the bill of complaint to meet the prior decision of this Court, and further directing that the defendants recover against the complainant their costs and charges incurred upon the said demurrer, to be taxed, and that the said costs and charges having been duly adjusted by the Clerk of this Court upon notice to the complainant at the sum of Two hundred and twenty-seven dollars ($227); now, upon motion of Hoadly, Lauterbach & Johnson, attorneys for the defendants, it is

Adjudged and decreed, that the said amended bill of complaint herein be and the same hereby is dismissed, and that the defendants recover of the complainant the sum of Two hundred and twenty-seven dollars ($227); their costs and charges as taxed, and that the defendants have execution therefor.

JOHN A. SHIELDS, *Clerk.*

(Endorsed:) United States Circuit Court, Southern District of New York.—The Old Dominion Copper Mining and Smelting Co. Pl'ff *vs.* Frederick Lewisohn, *et al.* Def't.—Judgment.—Hoadly, Lauterbach & Johnson, Attorneys for Defendants, 22 William St. New York City.—U. S. Circuit Court, Southern District New York.—Filed Dec. 6, 1905.—John A. Shields, Clerk.

Circuit Court of the United States, Southern District of New York.

In Equity. No. 8333.

OLD DOMINION COPPER MINING AND SMELTING COMPANY
v.
FREDERICK LEWISOHN ET AL.

Petition for Appeal.

The Old Dominion Copper Mining and Smelting Company, the complainant in the above entitled cause, conceives itself to be aggrieved by the decree made and entered on the eighteenth day of November, 1905, in the above entitled cause, dismissing the amended bill of complaint therein, and hereby appeals from said decree to the United States Circuit Court of Appeals for the Second Circuit, for the reasons specified in the assignment of errors which is filed herewith, and prays that this appeal may be allowed and that a transcript of the record, proceedings and papers

upon which said decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Circuit.

BRANDEIS, DUNBAR & NUTTER,
HUGHES, ROUNDS & SHURMAN,
Solicitors for Appellants.

Appeal allowed.
E. H. LACOMBE,
U. S. Circuit Judge.

(Endorsed:) Circuit Court of the United States, Southern District of New York.—In Equity, No. 8,333.—Old Dominion Copper Mining and Smelting Company *v.* Frederick Lewisohn, *et al.*—Petition for Appeal.—Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass., and Hughes, Rounds & Schurman, 96 Broadway, New York City, Solicitors for Complainant.—A copy this day received.—Jan. 3, 1906, Hoadly, Lauterbach & Johnson.—U. S. Circuit Court, Southern District New York.—Filed Jan. 3, 1906.—John A. Shields, Clerk.

47 Circuit Court of the United States, Southern District of New York.

In Equity. No. 8333.

OLD DOMINION COPPER MINING AND SMELTING COMPANY
v.
FREDERICK LEWISOHN ET AL.

Assignment of Errors.

Now comes the Old Dominion Copper Mining and Smelting Company, the complainant in the above entitled cause, and says that the final decree of said court in said cause, sustaining the demurrer of the respondents to the amended bill of complaint therein, is erroneous and against the just rights of said complain-t for the following reasons:

First. The court erred in holding that the amended bill of complaint did not state a case entitling the complainant to any relief in equity.

Second. The court erred in holding that the facts alleged in the amended bill of complaint and admitted by the demurrer did not entitle the complainant to rescind the sale complained of and recover from the respondents the consideration paid or in the alternative to recover from the respondents the damages suffered by the complainant by reason of such sale.

Third. The court erred in holding that upon the facts alleged in the amended bill of complaint and admitted by the de-
48 murrer there was any consent to the sale complained of such as to disable the complainant from rescinding the same or having other relief in respect thereof.

Fourth. The court erred in not holding that upon the facts alleged in the amended bill of complaint and admitted by the demurrer the respondents' testator Leonard Lewisohn was a promoter of the plaintiff corporation and by reason thereof upon the facts so alleged and admitted liable to account to the complainant upon a rescission or offer of rescission by it of said sale complained of for the consideration received for said sale, or to restore to the complainant the profits made by him from such sale, or compensate the complainant for the damages suffered by it by reason of such sale, and in not holding that the respondents as executors of the will of said Leonard Lewisohn are in their representative capacity in like manner liable.

Fifth. The court erred in not overruling the demurrer to the amended bill of complaint and in ordering the amended bill of complaint to be dismissed.

BRANDEIS, DUNBAR & NUTTER,
HUGHES, ROUNDS & SCHURMAN,
Solicitors for Appellants.

(Endorsed:) Circuit Court of the United States, Southern District of New York.—In Equity, No. 8,333.—Old Dominion Copper Mining and Smelting Company *vs.* Frederick Lewisohn, *et al.*—Assignment of Errors.—U. S. Circuit Court, Southern District New York.—Filed Jan. 2, 1906.—John A. Shields, Clerk.

49 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

OLD DOMINION COPPER MINING AND SMELTING COMPANY
vs.
FREDERICK LEWISOHN, WALTER LEWISOHN, ALBERT LEWISOHN and PHILIP S. HENRY as Executors of the Will of Leonard Lewisohn, Late of New York, Deceased.

Bond for Damages and Costs.

Know all men by these presents, that we, Old Dominion Copper Mining and Smelting Company, a corporation duly organized under the laws of New Jersey, as principal, and American Surety Company of New York, a corporation duly organized under the laws of New York as surety are held and firmly bound unto the above-named Frederick Lewisohn, Walter Lewisohn, Albert Lewisohn and Philip S. Henry, executors of the will of Leonard Lewisohn, late of New York, deceased, obligees, in the sum of five hundred (500) dollars, to be paid to the said obligees for the payment of which well and truly to be made, we bind ourselves, and each of us, our and each of our successors and assigns, jointly and severally, firmly by these presents. Sealed with our seals and dated the twenty-third day of December in the year of our Lord one thousand nine hundred and five.

Whereas, the above-named Old Dominion Copper Mining and Smelting Company has prosecuted an appeal to the United States Circuit Court of Appeals for the Second Circuit to reverse the decree rendered in the above-entitled suit, by the Judge of the Circuit Court of the United States, for the Southern District of New York;

Now, therefore, the condition of this obligation is such, that if the above-named Old Dominion Copper Mining and Smelting Company shall prosecute said appeal to effect and answer all damages and costs, if it shall fail to make said plea good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

OLD DOMINION COPPER MINING AND SMELTING COMPANY. [SEAL.]
CHARLES S. SMITH, *Prest.*
CHARLES H. ALTWILLER, *Treas.*
[SEAL.] AMERICAN SURETY COMPANY OF NEW YORK,
By ELIPHALET F. PHILBRICK,
Resident Vice-President.

Attest:
FRED L. ROBERTS,
Res. Asst. Secretary.

Sealed and delivered and taken and acknowledged this 22nd day of December, 1905, before me,
[SEAL.] ROBERT W. SAWYER, JR.,
Notary Public.

(Endorsed:) U. S. Circuit Court, Southern District of New York.—Old Dominion Copper Mining and Smelting Company *vs.* Frederick Lewisohn *et al.*—Bond for Damages and Costs on Appeal.—We hereby approve of the form and sufficiency of the within undertaking.—Hoadly, Lauterbach & Johnson, Solicitors for Defendants.—Brandeis, Dunbar & Nutter, Hughes, Rounds & Schurman, Solicitors for Complainant.—E. H. Lacombe, U. S. C. J.—U. S. Circuit Court, Southern District New York.—Filed Jan. 3, 1906.—John A. Shields, Clerk.

Circuit Court of the United States, Southern District of New York.

In Equity. No. 8333.

OLD DOMINION COPPER MINING & SMELTING COMPANY
against
FREDERICK LEWISOHN ET AL.

Citation on Appeal.

UNITED STATES OF AMERICA, *ss:*

To Frederick Lewisohn, Walter Lewisohn, Albert Lewisohn and Philip S. Henry, Greeting:

You are hereby cited and admonished to be and appear at a Term of the United States Circuit Court of Appeals, for the Second Circuit, to be held at the Post Office Building, Borough of Manhat-
52 tan, City of New York, on the 31st day of January, 1906, pursuant to an appeal filed in the Clerk's Office of the Circuit Court of the United States for the Southern District of New York, wherein the Old Dominion Copper Mining & Smelting Company is appellant, and Frederick Lewisohn, Walter Lewisohn, Albert Lewisohn and Philip S. Henry are respondents, to show cause, if any there be, why the judgment herein as mentioned in said petition for appeal should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness, Hon. Melville W. Fuller, Chief Justice of the United States, this 29th day of December, 1905.

E. H. LACOMBE,
Circuit Judge.

(Endorsed:)—Circuit Court of the United States, Southern District of New York.—Old Dominion Copper Mining & Smelting Company, against Frederick Lewisohn *et al.*—In Equity. No. 8333.—Citation on Appeal.—Brandeis, Dunbar & Nutter, 161 Devonshire Street, Boston, Mass., and Hughes, Rounds & Schurman, 96 Broadway, New York City, Solicitors for Complainant.—A copy this day received Jan. 3, 1906.—Hoadly, Lauterbach & Johnson.—U. S. Circuit Court, Southern District, New York.—Filed Jan. 3, 1906.—John A. Shields, Clerk.

53 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, do hereby Certify that the foregoing pages, numbered from one to fifty-five, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the cause entitled Old Dominion Copper Mining & Smelting Company, Complainant-

Appellant, against Frederick Lewisohn *et al.*, Defendants-Appellees, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 19th day of February, in the year of our Lord One Thousand Nine Hundred and Six and of the Independence of the said United States the One Hundred and Thirtieth.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

54 United States Circuit Court of Appeals for the Second Circuit.

No. 64, October Term, 1906.

Argued November 19, 1906; Decided December 4, 1906.

THE OLD DOMINION COPPER MINING AND SMELTING COMPANY, Complainant-Appellant,

vs.

FREDERICK LEWISOHN ET AL., Defendants-Appellees.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Before Judges Wallace, Townsend, and Coxe.

On appeal from a decree of the Circuit Court for the Southern District of New York sustaining a demurrer to an amended bill of complaint and dismissing the bill for want of equity.

The opinion of the Circuit Court sustaining the demurrer to the original bill is reported in 136 Fed. Rep. 915.

The court held upon the hearing of the demurrer to the amended bill that there was no substantial difference between it and the original bill and followed the former decision. Final decree was thereupon entered and the complainant appeals.

The facts sufficiently appear in the opinion of the Circuit Court sustaining the demurrer to the original bill, 136 Fed. Rep. 915, and are stated in full in Old Dominion C. M. & S. Co. *v.* Bigelow (188 Mass. 315).

Per Curiam.—The bill prays for relief as follows:

55 *First.* That the sale of the mining claims to the complainant by Leonard Lewisohn—the defendants' testator—and Albert S. Bigelow—a citizen of Massachusetts and not a party to this action, be rescinded and the real estate reconveyed to the defendants upon receipt by the complainant of the consideration paid therefor.

Second. That defendants return to the complainant the consideration paid by complainant for said property, namely, 30,000 shares of its capital stock, or account therefor.

Third. That if the court shall decide that the complainant is not entitled to rescind the sale of said real estate to it, then, and in that event, that the court ascertain the amount of damages sustained by complainant and direct the defendants as executors to pay the amount to complainant.

We are unable to perceive how this relief or any part thereof can be granted the complainant upon the facts alleged in the bill.

The fundamental difficulty with the bill is that it fails to state any facts showing that the complainant was in any way injured or defrauded by the transactions complained of. At the time of the transfer by Bigelow and Lewisohn to the company Bigelow and Lewisohn and their representatives owned the entire issue of stock of the corporation. The sale by them to the corporation was in effect a sale by them to Bigelow and Lewisohn. A corporation can only act through the human beings who compose it; it cannot be deceived or defrauded unless its stockholders and directors are deceived or defrauded. The corporation knew all that Bigelow and Lewisohn knew and no one of the original parties to the transfer was defrauded by the exchange of the stock controlled by Bigelow and Lewisohn for the real estate controlled by them.

It may be that such a large over-capitalization as is alleged in the bill might mislead and deceive careless and credulous purchasers of the stock, but we are not now dealing with the case of a stockholder alleging concealment, fraud and misrepresentation. The stockholders, apparently, have no complaint; at least they have not propounded any.

56 Indeed, it is not easy to see how a purchaser, who paid $25 per share, could be defrauded in view of the allegation of the bill that "The shares of this corporation so issued in payment for the property sold to it as aforesaid were at the time of the fair market value of twenty-five (25) dollars each, and continued for a long time thereafter to be of such or greater value." It is enough, however, that this is not a stockholders' action.

The subscribers for the 20,000 shares subsequently issued were not deceived; they asked for no statement and received none; they got what they purchased and are not complainants here.

A protracted discussion is unnecessary for the reason that this court and the Circuit Court of the Southern District have decided the question adversely to the complainant's contention.

Foster *v.* Seymour (23 Fed. Rep. 65); McCracken *v.* Robison (57 *Id.* 375).

To the same effect are the decisions of the New York Court of Appeals.

Barr *v.* N. Y., L. E. & W. R. Co. (125 N. Y. 263); Blum *v.* Whitney (185 N. Y. 232).

It is true that the Supreme Court of Massachusetts (188 Mass. 315) has taken a different view, but we feel constrained to adhere to the prior adjudication of this circuit.

The decree is affirmed with costs.

Louis Brandeis, for the Appellant.

Eugene Treadwell, for the Appellees.

57 At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 14th day of December one thousand nine hundred and six.

Present: Hon. William J. Wallace, Hon. William K. Townsend, Hon. Alfred C. Coxe, Circuit Judges.

OLD DOMINION COPPER MINING AND SMELTING COMPANY, Complainant-Appellant,

vs.

FREDERICK LEWISOHN ET AL., Defendants-Appellees.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the Circuit Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said Circuit Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said Circuit Court in accordance with this decree.

W. J. W.
W. K. T.

58 Endorsed: United States Circuit Court of Appeals, Second Circuit. Old Dominion Copper Co. *vs.* F. Lewisohn. Order for Mandate. United States Circuit Court of Appeals Second Circuit. Filed Dec. 17, 1906. William Parkin, Clerk.

59 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 58 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Old Dominion Copper Mining & Smelting Co. against Frederick Lewisohn *et al.* as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 20th day of December, in the year of our Lord One Thousand Nine Hundred and Six and of the Independence of the said United States the One Hundred and thirty-first.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

60 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there is now pending before you a suit in which Old Dominion Copper Mining & Smelting Company is appellant and Frederick Lewisohn, Walter Lewisohn, Albert Lewisohn, and Philip S. Henry, Executors of Leonard Lewisohn, deceased, are appellees, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the Circuit Court of the United States for the Southern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States,
61 do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 27th day of February, in the year of our Lord one thousand nine hundred and seven.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

62 [Endorsed:] File No. 20,538. Supreme Court of the United States. No. 573, October Term, 1906. The Old Dominion Copper Mining & Smelting Co., *vs.* Frederick Lewisohn *et al.*, Executors &c. Writ of Certiorari. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 4, 1907. William Parkin, Clerk.

63 To the Supreme Court of the United States:

The record and all proceedings whereof mention is within made having lately been certified and filed in the office of the Clerk of the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed and certified as the return to the writ of certiorari issued herein.

Dated New York, March 4th, 1907.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

64 United States Circuit Court of Appeals for the Second Circuit.

OLD DOMINION COPPER MINING AND SMELTING COMPANY
vs.
FREDERICK LEWISOHN ET AL.

It is hereby stipulated that the transcript already filed in the Clerk's office of the Supreme Court of the United States with the petition for the writ of certiorari be taken as a return to said writ dated the twenty seventh day of February, A. D., 1907.

EUGENE TREADWELL,
HOADLY, LAUTERBACH & JOHNSON,
Solicitors for Respondent.

LOUIS D. BRANDEIS,
WILLIAM H. DUNBAR,
BRANDEIS, DUNBAR & NUTTER,
Solicitors for Appellants.

Endorsed: Old Dominion Copper Mining and Smelting Company *vs.* Frederick Lewisohn *et al.* Stipulation. Brandeis, Dunbar & Nutter, Counsellors at Law, 161 Devonshire St., Boston. United States Circuit Court of Appeals Second Circuit. Filed Mar. 4, 1907. William Parkin, Clerk.

65 [Endorsed:] 573, 20538. United States Circuit Court of Appeals, Second Circuit. Old Dominion C. M. & S. Co. *v.* Frederick Lewisohn *et al.* Return to Certiorari. 1.70. 573, 20538. Mar. 11, '07.

66 [Endorsed:] File No. 20,538. Supreme Court U. S. October Term, 1907. Term No. 206. Old Dominion Copper Mining & Smelting Co. app'l't, *vs.* Frederick Lewisohn *et al.* Writ of Certiorari and return Filed March 11th, 1907.

No. [redacted]. 206.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

THE OLD DOMINION COPPER MINING AND SMELTING COMPANY, PETITIONER,

v.

FREDERICK LEWISOHN ET AL., RESPONDENTS.

MOTION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

LOUIS D. BRANDEIS,
WILLIAM H. DUNBAR,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

THE OLD DOMINION COPPER MINING AND SMELTING COMPANY,
Petitioner,

v.

FREDERICK LEWISOHN ET AL., *Respondents.*

Now comes the Old Dominion Copper Mining and Smelting Company by Louis D. Brandeis and William H. Dunbar, its solicitors, and moves this Honorable Court by writ of certiorari or other proper process directed to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, to require said Court to certify to this Court for its review and determination a certain cause in said Circuit Court of Appeals lately pending wherein your petitioner the Old Dominion Copper Mining and Smelting Company was appellant, and the respondents Frederick Lewisohn and others were appellees, and to that end it now tenders herewith its petition and brief with a certified copy of the entire record in said cause in said Circuit Court of Appeals.

OLD DOMINION COPPER MINING
AND SMELTING COMPANY,

By

LOUIS D. BRANDEIS,
WILLIAM H. DUNBAR,

its solicitors.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

THE OLD DOMINION COPPER MINING AND SMELTING COMPANY, PETITIONER,

v.

FREDERICK LEWISOHN AND OTHERS, EXECUTORS, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Justices of the Supreme Court of the United States:

Your petitioner, the Old Dominion Copper Mining and Smelting Company, respectfully represents:

First. Your petitioner is and at all times hereinafter mentioned was a corporation duly organized under the laws of the State of New Jersey.

The respondents are the executors duly appointed and qualified of one Leonard Lewisohn, late of New York, deceased.

Second. On or about October 7, 1902, the petitioner filed a bill of complaint in the Supreme Judicial Court for the County of Suffolk in the Commonwealth of Massachusetts against one Albert S. Bigelow, a citizen of Massachusetts, seeking to recover a secret profit made by him in conjunction with said Leonard Lewisohn out of a sale of property to the petitioner, while they were acting as promoters in the organization of the petitioner. The respondents were not joined in this suit owing to the impossibility of obtaining jurisdiction over them in Massachusetts. Bigelow demurred to the bill of complaint so filed against him on the ground of multifariousness and to so much of the bill as asked for a rescission of the sale and return of the consideration for want of equity and want of parties.

Third. On January 6, 1903, the petitioner filed in the Circuit Court of the United States for the Southern District of New York

a bill of complaint against the present respondents. The bill was upon the same cause of action set forth in the bill filed in Massachusetts against Bigelow and was identical with the latter bill except such verbal changes and additions as were made necessary by the differences in the parties defendant. Bigelow was not joined as a defendant because of the impossibility of obtaining jurisdiction over him in New York. The respondents, to the bill filed against them in the Circuit Court, interposed demurrers identical with the demurrers filed by Bigelow in the suit in Massachusetts.

Fourth. On February 20, 1905, the suit brought in the Circuit Court in New York was heard upon the demurrers; the Court treated the demurrers as general and ordered the bill dismissed for want of equity but with leave to amend (136 F. R. 915). The petitioner filed an amended bill. On December 7, 1904, the suit brought against Bigelow was heard upon demurrer before the full bench of the Supreme Judicial Court of Massachusetts, and on June 19, 1905, by a unanimous opinion, the demurrer was overruled (188 Mass. 315). A copy of this report is printed as an appendix to this petition. The Court carefully considered and disapproved the decision of the Circuit Court for the Southern District of New York in the present case. To the amended bill filed in the Circuit Court in the present case the respondents demurred as before; the suit was heard upon the demurrers; the Court held, without expressing any opinion on the merits, that the amended bill was substantially the same as the original bill and that for this reason the demurrers should be sustained and the bill dismissed (Rec., p. 23). From this decision the petitioner duly appealed to the Circuit Court of Appeals.

Fifth. The appeal was heard before the Circuit Court of Appeals, and on December 4, 1906, that Court, by a decision rendered *per curiam*, upheld the decision of the Circuit Court on the ground that the case was governed by decisions of the Circuit Court for the Southern District of New York and of Circuit Court of Appeals for the Second Circuit, and by decisions of the New York Court of Appeals. Of the decision in the Massachusetts case against Bigelow, the Court said only:

> "It is true that the Supreme Court of Massachusetts (188 Mass. 315) has taken a different view, but we feel constrained to adhere to the prior adjudication of this Circuit" (Rec., p. 31).

Sixth. The amended bill of complaint alleges the following material facts:

On April 30, 1895, the Old Dominion Copper Company of Baltimore (hereafter called the Baltimore Old Dominion Company) owned and was operating a copper mine in Arizona; it had a capital stock of five hundred thousand dollars divided into twenty-five

thousand twenty-dollar shares, of which five-sevenths belonged to the executors of the will of Michael Simpson, of Boston, and two-sevenths belonged to William Keyser, of Baltimore.

At some time prior to May 4, 1895, Leonard Lewisohn and Albert S. Bigelow formed the plan of acquiring all the stock of the Baltimore Old Dominion Company, forming a new corporation to take over the mining property, selling the mining property to the new corporation at a large profit and contemporaneously having the new corporation offer for subscription by the public enough of its stock to provide a working capital. To carry out this plan Lewisohn and Bigelow obtained an option to purchase the Simpson stock at forty dollars a share, and formed the Old Dominion Syndicate, so called, to provide money for the purchase of this stock and the Keyser stock. The members of the Old Dominion Syndicate subscribed a fund of one million dollars, payable in instalments, upon the terms that the fund should be used to acquire the property or capital stock of the Baltimore Old Dominion Company, with a view to resale, and that the subscribers should receive the profit made in proportion to their several subscriptions.

On May 27, 1895, the first payment under the Simpson option fell due and was made from the funds of the syndicate. On June 13, 1895, Lewisohn and Bigelow secured an option on the Keyser stock, also at forty dollars per share, and on June 20 made, from the funds of the syndicate, the first payment under that option. On the same day Keyser, without the payment of any further consideration, conveyed to Lewisohn, for the benefit of the latter and Bigelow, certain mining claims, title to which stood in the name of Keyser. At this time, or shortly after, all the stock in the Baltimore Old Dominion Company was transferred to Lewisohn and Bigelow, or their nominees, the directors and other officers resigned, new directors selected by Lewisohn and Bigelow were chosen, and Bigelow was chosen president.

On July 8, 1895, Lewisohn and Bigelow had the Old Dominion Copper Mining and Smelting Company, the present petitioner, organized under the laws of New Jersey, selecting for the purpose seven incorporators who subscribed for forty shares of stock, Lewisohn and Bigelow paying the subscriptions. On the following day the authorized capital was increased to three million seven hundred and fifty thousand dollars, in shares of twenty-five dollars each, and officers were chosen from among the incorporators. On July 11, 1895, five of the directors, and the president and treasurer resigned, by instructions of Lewisohn and Bigelow, and the vacancies were filled with their nominees. As a result the new board of directors consisted of Lewisohn, Bigelow, their attorney, Allen M. Evarts, one Edgar Buffam, employed by them for the purpose, and three other persons interested in the Old Dominion Syndicate; Bigelow was chosen president of the corporation.

Immediately after these changes a meeting of directors was held at which were present Lewisohn, Bigelow, their attorney, Evarts, and their employee, Buffam. At this meeting Bigelow presented an offer of the Baltimore Old Dominion Company, signed

by him as its president, to sell all its property, except the cash assets, to the new company for one hundred thousand shares of stock. Lewisohn and Bigelow caused this offer to be accepted. Lewisohn then presented an offer to sell to the corporation the mining claims transferred to him by Keyser for thirty thousand shares of stock. Lewisohn and Bigelow caused this offer to be accepted.

On July 18, 1895, Lewisohn and Bigelow, pursuant to their original plan, caused the directors of this corporation to offer twenty thousand shares of stock to the public in order to furnish working capital. This stock was all subscribed for at par.

The property of the Baltimore Old Dominion Company and the mining claims were subsequently conveyed to this corporation, and on September 18, 1895, Lewisohn and Bigelow caused all the stock to be issued and certificates delivered, one hundred thousand shares to their nominee for the Baltimore Old Dominion Company, on account of its property, thirty thousand shares to themselves jointly on account of the mining claims, and twenty thousand shares to the subscribers on account of their cash subscriptions. Of the one hundred thousand shares, eighty thousand were distributed to the members of the Old Dominion Syndicate, and the remaining twenty thousand were held by Lewisohn and Bigelow, ostensibly for their expenses. The thirty thousand shares were divided between Lewisohn and Bigelow.

The entire transaction was pursuant to a plan formed by Lewisohn and Bigelow before they acquired any option to buy the stock of the Baltimore Old Dominion Company or acquired the mining claims, and all the steps taken were by their direction and with this plan in view. The mining claims transferred to this corporation for thirty thousand shares of its stock of the par value, and at that time and subsequently of the market value of twenty-five dollars per share, were worth not more than five thousand dollars, and they are now in the same condition as when so transferred. None of the members of the Old Dominion Syndicate, except Lewisohn and Bigelow themselves, and none of the persons who subscribed for the twenty thousand shares offered to the public had any knowledge of the profits taken by Lewisohn and Bigelow through the sale of these mining claims. The corporation remained under the control of Lewisohn and Bigelow until April, 1902; then upon a change of management the matter was investigated and shortly after this suit and the suit against Bigelow were brought.

The present bill asks relief only in respect to the transfer of the mining claims. The prayer of the bill is for a rescission of that sale and recovery of the shares issued as consideration therefor or in the alternative for an accounting by the defendants for those shares and their proceeds, or for recovery of the damage suffered.

Seventh. The demurrers filed to the amended bill of complaint were: first, to the whole bill for multifariousness, on the ground that the bill sets up different and inconsistent cases and

prays for different and inconsistent relief; second, to so much of the bill as seeks a rescission for want of equity and for want of parties in that Bigelow is not joined as a defendant.

Eighth. Your petitioner is advised that the decision of the Circuit Court of Appeals affirming the decree of the Circuit Court dismissing said amended bill of complaint for want of equity is erroneous, and your petitioner submits that the decision should be reviewed by this Court:

1. Because the decision of the Circuit Court of Appeals and the decision of the Supreme Judicial Court of Massachusetts are directly opposed in identical cases arising out of a single transaction.

2. Because the decision of the Circuit Court of Appeals is inconsistent with the principles laid down in the decision of Circuit Court of Appeals for the Sixth Circuit in the case of *Yeiser* v. *United States Board and Paper Co.*, 107 F. R. 340.

3. Because the decision involves a question of importance and general interest, namely, — whether a corporation can recover, by rescission or by an accounting, a secret profit made by promoters in selling property to it, notwithstanding the approval of the transaction by the promoters and their agents as holders of a nominal amount of stock all at the time outstanding, given in anticipation of an issue of stock offered and intended to be offered to the public as part of the promotion of the corporation.

Your petitioner submits herewith a certified copy of the record in said Circuit Court of Appeals of the decree of reversal and of the opinion of said Court and a brief in support of this petition.

Wherefore your petitioner respectfully prays that a writ of *certiorari* may be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court for the Second Circuit, requiring said Court to certify and send to this Honorable Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals in said case, entitled therein *Old Dominion Copper Mining and Smelting Company* v. *Frederick Lewisohn and others*, No. 64, to the end that said case may be reviewed and determined by this Honorable Court as provided by law, and that your petitioner may have such other and further relief or remedy in the premises as to this Honorable Court may seem meet.

OLD DOMINION COPPER MINING
AND SMELTING COMPANY,

By

LOUIS D. BRANDEIS,
WILLIAM H. DUNBAR,
Its Solicitors.

COMMONWEALTH OF MASSACHUSETTS, }
COUNTY OF SUFFOLK, } ss.

William H. Dunbar, being duly sworn, says that he is one of the counsel for the Old Dominion Copper Mining and Smelting Company, the above-named petitioner, that he prepared the foregoing petition, and that the allegations thereof are true as he verily believes.

WILLIAM H. DUNBAR.

Subscribed and sworn to before me by William H. Dunbar this twelfth day of January, A.D. 1907. My commission expires September 20, A.D. 1912.

ROBERT W. SAWYER, JR.,

[NOTARIAL SEAL.] *Notary Public.*

[APPENDIX.]

OLD DOMINION COPPER MINING AND SMELTING COMPANY

vs.

ALBERT S. BIGELOW.

SUFFOLK. DECEMBER 7, 1904–JUNE 19, 1905.

Present: Knowlton, C.J., Morton, Lathrop, Barker, and Loring, J.J.

[Head note omitted.]

Bill in Equity, filed October 7, 1902.

The following statement of the case is taken from the opinion of the Court:

This cause came on to be heard on two demurrers. The defendant filed a demurrer to the whole bill, and what purported to be a demurrer to so much of the bill "as seeks to have the sale of certain parcels of real estate conveyed to the plaintiff by Leonard Lewisohn rescinded, and to have the defendant ordered to return to the plaintiff the consideration paid by the plaintiff for said conveyance." On the plaintiff's stipulating that in case the demurrers, or either of them, should be sustained on the merits, the bill, or so much thereof as the demurrers applied to, should be dismissed, the cause was reserved for the consideration of the full Court.

The case stated in the bill, so far as material here, is in effect as follows. The defendant and one Lewisohn, at some time before March, 1895, formed the plan of buying the property of the Old Dominion Copper Company of the City of Baltimore (hereinafter spoken of as the Baltimore Company), and four certain mining claims and a mill site standing in the name of one Keyser (hereinafter spoken of as the real estate here in question), with a view to reselling them at a profit to a corporation to be organized by them for that purpose. Their scheme was first to buy all the stock of the Baltimore Company. Having got control of that Company through their ownership of all of its capital stock, they were to organize a new company, and before the stock of the new company was issued and while it was entirely in their control as the organizers of it, they were to sell to it the property of the Baltimore Company and the real estate here in question, for a specified number of shares of the new company, the balance of shares in the capital stock of the new company being sold to the public to provide working capital and to build additions. All this was done. The plaintiff was the new corporation. The defendant and Lewisohn got the money with which to buy all shares in the capital stock of the Baltimore Company from a syndicate (hereinafter called the Dominion Syndicate) which they organized for the purpose and to

which they agreed to pay two dollars for every dollar paid into the syndicate treasury in case the scheme was a success, with a privilege given to the syndicate members of taking shares at par in the new corporation in place of money. Five-sevenths of the stock of the Baltimore Company were bought of the executors of one Simpson, for a sum not more than $613,137.39; and the other two-sevenths, together with the real estate here in question, of one Keyser and "other persons to the plaintiff unknown," for a sum not exceeding $175,182.11; and thereupon the real estate here in question was conveyed to Lewisohn. These transactions were carried through on July 8, 1895. On the same 8th day of July, 1895, the plaintiff corporation was organized by seven persons employed by the defendant and Lewisohn for the purpose, apparently with a capital stock of $1,000, divided into forty shares of $25 each, which were issued to the incorporators, but were in fact paid for by the defendant and Lewisohn. On July 9, 1895, the incorporators met, chose themselves directors, and increased the authorized capital stock from $1,000 to $3,750,000 composed of one hundred and fifty thousand shares of $25 each. At a meeting of the directors held on July 11, 1895, pursuant to instructions from the defendant, five directors resigned, and the defendant and Lewisohn, together with three members of the Dominion Syndicate, were appointed in their places. Thereupon the defendant and Lewisohn took their seats on the board. The other three new directors were not present. After these changes in the directorate, the directors present at the meeting were the defendant, Lewisohn, one Evarts, "the attorney employed by said defendant and said Leonard Lewisohn to attend to the incorporation of the plaintiff corporation and to carry out their said plan and conspiracy," and one Buffam, a person "selected" and "employed" by the defendant and Lewisohn "to act as director and assist them in carrying out said plan and conspiracy." Thereupon the defendant through said Evarts presented to the board an offer to sell to the plaintiff corporation the property of the Baltimore Company for one hundred thousand shares in its capital stock, and Lewisohn offered to sell to the plaintiff corporation the real estate here in question for thirty thousand shares in its capital stock. These offers were accepted and the stock was in fact subsequently issued in accordance therewith. Of the thirty thousand shares issued for the real estate here in question the defendant received sixteen thousand four hundred and ten, and Lewisohn thirteen thousand five hundred and ninety. Of the one hundred thousand shares issued for the property of the Baltimore Company, eighty thousand were issued to the syndicate, and the other twenty thousand were issued to the defendant and Lewisohn for their expenses and services. Of this twenty thousand the defendant received ten thousand nine hundred and forty, and Lewisohn nine thousand and sixty. It is alleged that at this time the fair market value of the shares in the capital stock of the plaintiff corporation was par, and "continued for a long time thereafter to be of such or greater value."

The bill goes on to allege that no disclosure was made of the

profit made by the issue of the thirty thousand shares for the real estate here in question to the persons who subscribed for the twenty thousand shares issued for working capital, or to the members of the syndicate to which the eighty thousand shares were issued (except to the defendant and Lewisohn, members thereof). It is alleged also that from July 11, 1895, to July 4, 1902, the plaintiff corporation was in effect in the control of the defendant and Lewisohn. Thereafter investigations were begun which resulted in the filing of this bill on October 7, 1902. It is alleged further that Lewisohn died on March 5, 1902, and at the time of his death was a resident and citizen of the City of New York; that the executors of his will are also residents and citizens of the City of New York; that no executors or legal representatives have been appointed or are within this Commonwealth; that there is no property within the Commonwealth belonging to said estate; and that it is impossible to get service within this Commonwealth on the executors of the will of Lewisohn. It is also alleged that the real estate here in question, at the time of the sale to the plaintiff, was "of substantially no value, to wit, of a value not exceeding five thousand (5,000) dollars, and . . . [was] . . . known by said Lewisohn and by the defendant when" they acquired the same and when they offered to sell the same to the plaintiff, "to be of substantially no value;" and that said "property has since said conveyance remained undeveloped and is now in substantially the same condition that it was in at the time of the conveyance" to the plaintiff.

The plaintiff alleges that it "desires to rescind the sale" of said real estate, "and has offered to convey" it "to the defendant, or to such person as he may request, upon receiving from said defendant" said thirty thousand shares, "or if and in so far as said shares have been disposed of, upon said defendant's duly accounting therefor; but said defendant refused to make any such restitution or accounting." After alleging a continued readiness to convey, the bill concludes with a prayer that the Court will declare the sale of the mining claims and of the mill site rescinded, and will direct the defendant to return the thirty thousand shares or, if and in so far as said shares are no longer in his control, to account to the plaintiff therefor, or, in the alternative, in case it is held that the sale is not rescinded and that the plaintiff is not entitled to rescind that sale, for damages. There is also a prayer for general relief.

It was stated at the bar that another bill had been brought for relief in respect of the issue of the one hundred thousand shares, and that the only relief here sought was in respect of the thirty thousand shares issued in payment for the real estate here in question.

The result of these transactions was that for the property for which the defendant and Lewisohn had paid not more than $788,319.50, the plaintiff corporation issued one hundred and thirty thousand shares of its capital stock having a market value of at least $3,250,000, a profit of at least $2,460,000. Of these one

hundred and thirty thousand shares, eighty thousand (which were worth at least $2,000,000) went to the syndicate; twenty thousand (worth at least $500,000) went to the defendant and Lewisohn for services and expenses; and thirty thousand (worth at least $750,000) went to the defendant and Lewisohn for the real estate here in question; and the balance, twenty thousand, to the public (apparently with the exception of the original forty shares issued to the incorporators and paid for by the defendant and Lewisohn).

L. D. Brandeis and W. H. Dunbar, for the Plaintiff.

A. Hemenway, (*J. W. Farley* with him,) for the Defendant.

LORING, J. [After the foregoing statement of the case.] The only question now before us is whether the plaintiff is entitled to any relief on these facts. If it is, it is not necessary to determine what that relief is. An attempt has been made to force a decision on the nature of the relief at this time by demurring "to so much of said bill as seeks to have the sale of certain parcels of real estate conveyed to the plaintiff by Leonard Lewisohn rescinded, and to have the defendant ordered to return to the plaintiff the consideration paid by the plaintiff for said conveyance." But there is no part of the bill which seeks rescission. This demurrer is not a demurrer to a part of the bill; it is to the whole bill so far as it seeks rescission. This so-called demurrer to a part is in fact an assignment of causes of demurrer to the whole bill, and will be so treated.

The defendant has contended that on the facts stated in the bill no case is made out for relief in respect of thirty thousand shares issued for the four mining claims and the mill site.

It will be useful to get a clear conception of what is and what is not alleged in the bill, and of the rights of the parties in such a transaction as that here set forth.

It was settled by the recent case of *Hayward* v. *Leeson*, 176 Mass. 310, that a promoter of a corporation stands in a fiduciary relation to the corporation of which he is a promoter.

It is clear that on the facts stated the defendant was a promoter of the plaintiff corporation.

It is not alleged here that the defendant made any misrepresentation as to the price paid by himself and Lewisohn for the property resold to the plaintiff at an advance, as was the case in *Gluckstein* v. *Barnes*, [1900] A.C. 240; S.C. below, *sub nomine In re Olympia*, [1898] 2 Ch. 153; *Hichens* v. *Congreve*, 4 Sim. 420. Where one standing in a fiduciary relation makes such a misrepresentation, it may well be that the purchaser can keep the property and force the vendor to make good the representation by paying to him, the purchaser, the difference between what was in fact paid by the vendor and what he represented that he paid for it.

Further, the defendant is not liable here on the ground that the plaintiff corporation is entitled to the benefit of the original

purchase of the real estate here in question, as a beneficiary is entitled where a person standing to him in a fiduciary capacity buys for himself and resells to him, the beneficiary, at a profit when he ought originally to have bought for the beneficiary. In such a case the purchaser can keep the property and charge the defendant with the difference in price. *Parker* v. *Nickerson*, 137 Mass. 487, 497.

When the defendant and Lewisohn bought this real estate they were under no obligation to make the purchase of it for the plaintiff corporation, which was not then in existence. Having bought the property at that time and paid for it with what as between them and the plaintiff corporation was their own money, they could have kept it or resold it to the plaintiff corporation or to anybody else, as they saw fit. The fact that the property was bought with a view to reselling it to a corporation to be organized for the purpose, and that that purpose was ultimately carried into effect, does not give to the corporation subsequently organized in execution of the original purpose a right to the benefit of the purchase. That was considered in *New Sombrero Phosphate Co.* v. *Erlanger*, 5 Ch.D. 73, 118, 119; and at still greater length in that case on appeal, *Erlanger* v. *New Sombrero Phosphate Co.* 3 App. Cas. 1218, by Lord Hatherley, at p. 1242, Lord O'Hagan, at p. 1255, and Lord Blackburn, at pp. 1267 and 1268. It is enough to say that we agree with what is there said. For a case where no relief was given because it was not made out that the company was entitled to the benefit of the original purchase, see *Ladywell Mining Co.* v. *Brookes*, 35 Ch.D. 400.

The situation then was this. The defendant and Lewisohn were, so far as this case goes, the absolute owners of the four mining claims and the mill site. We say the absolute owners so far as this case is concerned, because the rights of the Dominion Syndicate in this real estate, if any, are not here in question, and therefore so far as this case is concerned their rights, if any, may be disregarded. Being the absolute owners of it, the defendant and Lewisohn could do with that property as they pleased, — let it lie idle, work it, or sell it, as they thought best, and if they determined to sell it, they could sell it to any one they might choose. If they chose to sell it to a stranger they could make the sale at arm's length, they could ask any price they pleased, and were under no legal obligation to state what it had cost them. On the other hand, if they elected to make a sale of it to one standing to them in a fiduciary relation, they were under an obligation to make a full disclosure to the beneficiary of all the facts known to them material to the property and the purchase, or see to it that the fiduciary had adequate independent advice. That is an obligation resting upon every fiduciary who makes a sale of his own property to his beneficiary, no matter whether it is a case of trustee, a *cestui que* trust, guardian and ward, solicitor and client, or promotor of a corporation and the corporation itself.

There is no pretence that in the transaction in question the plaintiff corporation was represented by an independent board.

The defendant has sought in the first place to distinguish the case at bar from *Hayward* v. *Leeson*, 176 Mass. 310, on the ground that in the prospectus in that case there was the false statement that the capital stock represented actual value, without inflation, while a substantial part of it had been issued to the defendants and their associates for nominal services. But that fact was not spoken of in the opinion as the ground of the decision. The opinion went on the broad ground mentioned above. This false representation was spoken of in connection with a contention on the part of those defendants that they were not liable because of a finding made by the Superior Court that the defendants did not conceal the transaction from the knowledge of future stockholders. The case of *New Sombrero Phosphate Co.* v. *Erlanger*, 5 Ch.D. 73; S.C. on appeal, *Erlanger* v. *New Sombrero Phosphate Co.*, 3 App. Cas. 1218, is on all fours with the case at bar in this respect. In that case there was no misrepresentation.

In the second place, the defendant contends that the corporation cannot complain because the facts were known to the four directors who took part in the purchase and to the holders of all shares of capital stock of the corporation outstanding when the contract of purchase here in question was made, and because the purchase was acquiesced in by them. Their contention is that this result follows because one buying shares from a shareholder who acquiesces is bound by the acquiescence of his vendor. The four directors present at the directors' meeting when the real estate in question was sold by the defendant and Lewisohn to the plaintiff corporation for thirty thousand shares, were the defendant and Lewisohn, their attorney, and one Buffam, "a person selected by them and employed by them to act as director and assist them in carrying out said plan and conspiracy." On the allegations of the bill the defendant and Lewisohn are to be treated as the owners of all the shares then outstanding, and therefore the transaction is to be taken to have been known to and acquiesced in by all the then stockholders.

It is proper to pause here and see just what this contention means. When this contract was made on July 11, 1895, the authorized capital stock had just been increased from forty shares to one hundred and fifty thousand shares of $25 each, that is to say, from $1,000 to $3,750,000. Of the authorized capital stock, only forty shares, or $1,000 had then been issued. As we have said, these forty shares are to be treated on the allegations of the bill as the property of the defendant and Lewisohn. The scheme of the defendant and Lewisohn as to this capital stock of $3,750,000 divided into one hundred and fifty thousand shares, was to issue eighty thousand shares (or $2,000,000) to the syndicate, or sell them to the public for cash to provide $2,000,000 to be paid to the syndicate; twenty thousand shares (or $500,000) to themselves for their services and expenses as promoters; twenty thousand shares (or $500,000) to the public for cash for working capital, and the balance, thirty thousand shares (or $750,000) to themselves for the real estate here in question. And this scheme was carried

out. In carrying it out no disclosure was made to the persons who took the syndicate's eighty thousand shares (except those of the eighty thousand issued to the defendant and Lewisohn as members of the syndicate), nor to those who took the twenty thousand shares sold to the public for cash for working capital. Of the eighty thousand issued to or for the syndicate it is alleged that the defendant received four thousand. It is not alleged that any of this eighty thousand were issued to Lewisohn. The contention is that inasmuch as the defendant and Lewisohn owned all the forty shares of the corporation, amounting to $1,000, outstanding when the sale here in question was made by them to the corporation, the corporation is barred from complaining that a full disclosure of the material facts was not made by them to it.

Since the argument was made in the case now before us it has been decided by the Circuit Court of the United States for the Second Circuit in *Old Dominion Copper Mining Co.* v. *Lewisohn*, 136 Fed. Rep. 915, that this contention is correct. In that case a demurrer was sustained to a bill against the executors of Lewisohn, which is the counterpart of the bill now before us, on the ground that the point was concluded by two earlier cases, one in that Court, *Foster* v. *Seymour*, 23 Fed. Rep. 65, and the other in the Court of Appeals in that circuit. *McCracken* v. *Robison*, 57 Fed. Rep. 375.

Foster v. *Seymour*, 23 Fed. Rep. 65, was a case where the owners of a mine conveyed it to a corporation organized by themselves in payment for all its capital stock, to the par value of $10,000,000. The owners of the mine were the trustees of the corporation when the exchange was made. Afterwards this stock was sold on the market. The thing complained of in *Foster* v. *Seymour* was that the mine was in fact worth only $100,000. A stockholders' bill was brought in behalf of the corporation to make the trustees "account to the corporation for a fraudulent disposition of its capital stock." The statute under which the corporation was organized provided that stock could be paid for in property. It is to be observed of this case that the bill did not seek to set aside the purchase for a failure to disclose a material fact in selling the property of the company. The thing complained of was not that the property had been bought for $100,000 and sold for $10,000,000. It was that the mine in payment for which the whole capital stock of the corporation was issued was in fact worth only $100,000.

The other case on the authority of which *Old Dominion Copper Mining Co.* v. *Lewisohn* was decided (*McCracken* v. *Robison*, 57 Fed. Rep. 375) is a case where four men, including the defendant in error, Robison, by the expenditure of their own moneys organized a corporation to build a specified railroad, subscribing for the proportion of stock required as a preliminary by the laws of Michigan, procured the right of way and local aid in the form of donations of land and money to the enterprise, and with such assistance and with their own moneys undertook to furnish the road bed and cross ties for the whole road ready for laying the track and completing the superstructure. They then

caused the corporation to agree with the plaintiffs in error in consideration of their (the plaintiffs in error) agreeing to complete the road, to issue to them (the plaintiffs in error) all the capital stock and bonds of the corporation, the plaintiffs in error agreeing to pay the defendant in error individually one-half the profit afterwards commuted by agreement to $150,000. For this $150,000 this action was brought, and the plaintiffs in error set up in defence that the contract sued on was an illegal contract on which no action could be maintained in a court of law. Here the capital stock and bonds were issued to the plaintiffs in error for laying the track and completing the superstructure of a road of which the right of way, the road bed, grading and cross ties had been paid for by the defendants in error and by the donations and not by the corporation or the plaintiffs in error. So long as the corporation did not complain of the transaction, there would seem to be no reason why an agreement by which the incorporators were to be reimbursed for money expended by them in building the road was not valid.

In both *Foster* v. *Seymour* and *McCracken* v. *Robison* (in addition to what has been pointed out above) all the capital stock was issued to the directors and promoters who made the sale to the corporation complained of in payment for the property so sold. In such a case the transaction complained of is acquiesced in not only by all those interested, but by all who it is contemplated shall be interested in the corporation except as third persons should acquire the interest of some one or more of those persons. Such third persons are bound by the acquiescence of their vendors, and such a corporation is bound by the acquiescence of all its stockholders. See *In re Ambrose Lake Tin & Copper Mining Company*, 14 Ch.D. 390. See also *In re Postage Stamp Automatic Delivery Co.* [1892] 3 Ch. 566.

It is hardly necessary to point out the difference between such a case, where the scheme of the corporate organization does not contemplate there being any stockholders other than those who buy the stock issued in the transaction complained of, and a case like that now before us, where ninety-six thousand out of one hundred and fifty thousand shares are to be issued to persons to whom no disclosure was made.

Again, the case stated in the bill now before us does not come within the decision in *In re British Seamless Paper Box Co.*, 17 Ch.D. 467, where all persons acquiesced who were to have an interest so far as the scheme went which the parties then had, and where there was a subsequent change made in the scheme in good faith by which other persons were brought in.

The case submitted to us for decision here by the defendant's demurrer to this bill is a case where (disregarding the forty shares subscribed for to organize the corporation) the whole capital stock was one hundred fifty thousand shares, of which fifty-four thousand shares were to be issued to the promoters for services and for the sale of the land here in question, and the remaining ninety-six

thousand were to be issued to persons to whom the facts of this sale were not disclosed.

The question arises whether in such a case the rule enforced in *Hayward* v. *Leeson*, 176 Mass. 310, applies.

In *Hayward* v. *Leeson* it was held by this Court that a corporation was not barred in the recovery of secret profits made by the promoters by the fact that the promoters owned all the stock of the corporation when the agreement was made to pay them the profits recovered in that case. The secret profits agreed upon, paid and recovered in that case were paid-up shares of capital stock of the par value of $700,000 for services as promoters out of a capital of $3,000,000, the rest of which was subscribed to and paid for by the public in cash. To the cases cited in *Hayward* v. *Leeson* on this point, 176 Mass. at p. 320, should be added *Gluckstein* v. *Barnes*, [1900] A.C. 240, the decision of the House of Lords on appeal from *In re Olympia* (1898) 2 Ch. 153, made after the opinion in *Hayward* v. *Leeson* was written.

The question which we have to decide here is whether the difference in the way in which this transaction was carried through leads to the opposite result. If in the case at bar the ninety-six thousand shares not issued to the promoters had been offered to the public for cash to be used in buying the property of the old Baltimore Company and for working capital, and had been taken by them, the case at bar would have come directly within the decision in *Hayward* v. *Leeson*.

We see no reason why the rule enforced in *Hayward* v. *Leeson* does not apply to the case stated in the bill now before us.

The defendant has insisted that the corporation is barred in this case because if it (the corporation) is allowed to recover in such a suit the purchasers of the fifty-four thousand shares issued to the defendant and Lewisohn would get their share of the sum recovered and to that extent the purchasers of these shares would not be bound by the acquiescence of their vendors. That is true. That was true in *Hayward* v. *Leeson*. In that case the purchasers of the seven hundred and fifty thousand shares would have got their share of the sums recovered by the receiver in behalf of the corporation if there was any part of those sums left after the debts were paid. The argument is an old one and was disposed of by Lord Justice James in *New Sombrero Phosphate Co.* v. *Erlanger*, 5 Ch.D. 73, 118, 119. A corporation is not precluded from recovering for a fraud on it (the corporation) because the party committing the fraud is a stockholder.

Again, the corporation is not barred because when the agreement was made it acquiesced in the trade and it was then, from a legal point of view, fully born. That was equally true in *Hayward* v. *Leeson* and the cases cited in that case. The answer to that suggestion is that from a business point of view the agreement was not made to bind the corporation with a capital of $1,000, which was the corporation then in fact in existence, but to bind the corporation with a capital of $3,750,000. It was to that corporation

with a capital of $3,750,000 that a full disclosure ought to have been made, and to that corporation no disclosure ever was made.

On the case stated in this bill the defendant was a promoter of the plaintiff corporation; being a promoter he stood in a fiduciary relation to it; on selling to the plaintiff the real estate here in question he was bound to disclose all facts known to him material in the sale since it was not independently represented; the price at which the property recently had been bought with a view to reselling it to the plaintiff corporation was at any rate a material fact which he was bound to disclose; the knowledge of the defendant and Lewisohn was not equivalent to a disclosure to the plaintiff corporation, although they owned all the stock of the plaintiff corporation outstanding at the time the sale was made; and although fifty-six thousand out of one hundred and fifty thousand shares of the capital stock ultimately issued were issued to them; the defendant violated the duty which he owed the plaintiff in not disclosing that fact; and for this reason the contract here in question was not binding on the plaintiff.

On the facts stated the property sold having remained unchanged, the contract came to an end on the plaintiff's electing to rescind and tendering a reconveyance of it back to the defendant.

The only question of importance left is whether this bill can be maintained in the absence of the executors of the will of Lewisohn, who has since died.

The fact that the legal title to the real estate here in question stood in Lewisohn's name is not fatal to the plaintiff's maintaining this bill. Had the defendant been the sole owner, the fact that the title stood in the name of a man of straw and the contract had been made with the man of straw would not have made any difference in the result that the contract was ended. The fact that Lewisohn, also a promoter, had about a half interest in the contract does not affect the result unless his death and the fact that his executors reside in New York and that no legal representatives of his estate have been appointed or can be appointed in Massachusetts make a difference.

We are of opinion that these facts do not make a difference in the right of the plaintiff to maintain this bill. On the contract thus coming to an end by the offer to restore the property which had remained unchanged, the defendant and Lewisohn were bound as matter of contract to return the consideration received by them under this contract. But in our opinion that is not the only remedy open to the plaintiff. The thirty thousand shares were obtained from the plaintiff by the defendant and Lewisohn in violation of the duty owed to it by them by reason of the fiduciary relation in which they stood to the plaintiff. The fact that on the rescission of the contract the plaintiff corporation could have sued to recover back from the parties to the contract the consideration received by them under it does not preclude the plaintiff from charging the defendant directly with the violation of this fiduciary duty and compelling him to make restitution of what was so acquired by them. The plaintiff can waive its remedy

founded on the implied contract to return the consideration on the contract's being rescinded, and sue for the tortious violation of the duty owed by them to it because they stood to it in a fiduciary relation. In a suit founded on such an equitable tort Lewisohn's executors are not necessary parties. Such a bill may be brought against either.

Although the allegation made in the bill as to the real estate here in question remaining undeveloped and unchanged makes a decision on the point unnecessary, it is proper to point out that it has been laid down in this Commonwealth that in some cases a party to a contract who has a right to rescind is entitled to some remedy where the article sold has been consumed or altered before he has become aware of the facts which give him that right. *Parker* v. *Nickerson*, 137 Mass. 487. As to what the law is in England on this point, see *Ladywell Mining Co.* v. *Brookes*, 35 Ch.D. 400; *In re Cape Breton Co.*, 29 Ch.D. 795; S.C. on appeal, *sub nom. Bentinck* v. *Fenn*, 12 App. Cas. 652. See also *In re Ambrose Lake Tin & Copper Mining Co.*, 14 Ch.D. 390, 394.

It is hard to see why the defendant is not liable *in solido* for the whole thirty thousand shares, including those received by Lewisohn. See *Hayward* v. *Leeson*, 176 Mass. 310, 324, and cases there cited, to which should be added *Gluckstein* v. *Barnes*, [1900], A.C. 240; *Trull* v. *Trull*, 13 Allen, 407. But it is not necessary to express a final opinion on this point.

If the defendant does in fact restore the whole consideration, he will be subrogated to the real estate here in question, on the same principle on which a trustee making restitution of money improperly invested is subrogated to the improper investment.

A few technical objections remain to be disposed of, namely:

1. That the plaintiff has a complete and adequate remedy at law. There is a remedy in equity to compel restitution of money taken in violation of the duty owed by a fiduciary. *Hayward* v. *Leeson*, 176 Mass. 310, is an example. See also *Warren* v. *Para Rubber Shoe Co.* 166 Mass. 97, 104. This Court now has full equity jurisdiction. *Niles* v. *Graham*, 181 Mass. 41.

2. The defendant contends that the allegations as to the purchase of the property of the Baltimore Company either are surplusage and are to be disregarded, or they make the bill multifarious. As no relief in respect to those allegations is sought here, the bill is not made multifarious by them. So far as necessary to tell the story of the sale here complained of, it was proper to describe the sale of the Baltimore Company's property, and those allegations, to that extent, are not surplusage.

3. We see nothing inconsistent in the prayer for a rescission of the contract and in the prayer for damages by which (although inaptly put) we suppose the plaintiff intended what we have held it is entitled to.

The entry must be that

The so-called demurrer as to part of the bill shall stand as an assignment of a cause of a demurrer; demurrer overruled.

Office Supreme Court, U. S.
FILED.
JAN 19 1907
JAMES H. McKENNEY,
CLERK.

No. [redacted] 206.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

THE OLD DOMINION COPPER MINING AND SMELTING COMPANY, PETITIONER,

v.

FREDERICK LEWISOHN ET AL.

BRIEF FOR PETITIONER ON PETITION FOR WRIT OF CERTIORARI.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

THE OLD DOMINION COPPER MINING AND SMELTING COMPANY, PETITIONER,

v.

FREDERICK LEWISOHN ET AL.

BRIEF FOR PETITIONER ON PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF FACTS.

This is a petition for a writ of certiorari to review a decision of the Circuit Court of Appeals for the Second Circuit.

On January 6, 1903, the petitioner filed a bill in equity against the present respondents in the United States Circuit Court for the Southern District of New York, seeking to rescind a sale to it of certain mining claims and for other alternative relief. The respondents in that suit demurred to so much of the bill as sought rescission for want of equity and want of parties and to all the bill for multifariousness.

The bill was founded upon certain transactions by which the respondents' testator Leonard Lewisohn and one Albert S. Bigelow of Cohasset, Massachusetts, sold to the plaintiff corporation, which they organized for the purpose of making such a sale to it, certain mining claims in Arizona. Shortly before this bill was filed a bill identical in terms except so far as the different positions of the individuals who were defendants made differences necessary, was filed in the Supreme Judicial Court of Massachusetts against Bigelow, to rescind the same sale and for the other alternative relief. In the latter suit Bigelow filed demurrers identical with those filed in this suit. Bigelow could not be joined in the suit in New York for lack of jurisdiction over his person, and the respondents here could not be joined in the Massachusetts suit for lack of jurisdiction there over them. Both bills alleged that the transaction complained of was pursuant to a joint plan and conspiracy by Bigelow and Lewisohn, carried out for their joint benefit. Both suits were necessary unless the plaintiff was to elect to pursue one only of the alleged wrongdoers.

The Massachusetts suit was heard upon demurrer by the Supreme Judicial Court of Massachusetts in December, 1904. The suit in New York was heard upon demurrer on February 20, 1905, and on February 24 the demurrer was sustained (136 F.R. 915). The Circuit Court treated the so-called demurrer to part of the bill as a general demurrer for want of equity and held that the bill stated no cause of action. The bill was then amended so as to make certain allegations more specific, and to the amended bill demurrers identical with those to the original bill were filed, except that the demurrer to the whole bill was also for want of equity.

On June 19, 1905, the Supreme Judicial Court rendered a decision in the Massachusetts suit against Bigelow, overruling the demurrers. The Court considered carefully the decision of the Circuit Court in the present suit, which had been called to its attention, but declined to follow that decision and held that the bill stated a good cause of action (188 Mass. 315).

The amended bill in the Circuit Court in New York was heard on demurrer in November, 1905. The Court held that the amended bill was in substance the same as the original bill, and that the orderly course of practice therefore required that the former decision of the Circuit Court be followed and the demurrers sustained (Record, p. 23).

From the decision of the Circuit Court an appeal was duly taken to the Circuit Court of Appeals. Upon hearing that Court sustained the demurrers and affirmed the decision of the Circuit Court, briefly dismissing the decision in the Massachusetts suit on the ground of supposed inconsistency with certain decisions of the Circuit Court of Appeals and of the New York Court of Appeals (Record, p. 31). This petition is brought to review that decision.

The material facts set forth in the amended bill of complaint concisely stated are as follows:

Leonard Lewisohn and Bigelow formed a plan to acquire the mining property of the Baltimore Old Dominion Company, to resell it at a profit to a corporation to be formed by them for the purpose of purchasing, and to furnish the new corporation with working capital by having it issue part of its stock to the public.

In pursuance of this plan they acquired options on all the stock of the Baltimore Company, formed a syndicate to raise the one million dollars necessary to carry out the options, and did purchase all the stock. The members of the syndicate by the terms of the syndicate agreement were to share proportionately to their contributions in the profit (Record, p. 4). One William Keyser, owner of a part of the stock, who had given an option on his shares, upon completion of the purchase in addition to transferring his stock, conveyed to Lewisohn for the joint benefit of Lewisohn and Bigelow, certain mining claims now in question. The only consideration paid for this conveyance and transfer was the option price of the stock.

Lewisohn and Bigelow then organized the plaintiff corporation. The organization was effected by seven persons selected for the purpose who subscribed for forty shares, all of which were

paid for by Lewisohn and Bigelow. On July 11, 1895, the authorized capital was increased to one hundred and fifty thousand shares of twenty-five dollars each. Bigelow was chosen president, and the board of directors was reorganized so as to consist of Bigelow, Lewisohn, their attorney Evarts, an employee Buffam, and three members of the syndicate selected by them. After the changes in the board of directors Bigelow, Lewisohn, Evarts, and Buffam, being the only directors present, voted to accept an offer made by Bigelow as president of the Baltimore Company to sell all its property, except cash assets, for one hundred thousand shares of the plaintiff's capital stock and an offer of Lewisohn to sell the mining claims for thirty thousand shares.

One week later the directors offered the remaining twenty thousand shares (the forty shares already subscribed for being disregarded) to the public; those shares were all subscribed for at par. In September, 1895, all the capital stock was issued; one hundred thousand shares to a nominee of the Baltimore Company, in payment for the mining property, of which shares the syndicate received eighty thousand and Bigelow and Lewisohn appropriated the remainder; thirty thousand shares to Bigelow and Lewisohn for the mining claims; twenty thousand shares to the subscribers.

All of the acts set forth were done by Bigelow and Lewisohn as part of their original plan and in order to carry it out. The issue of shares to the public for working capital and the issue for the property purchased constituted in fact parts of a single transaction. None of the other syndicate members and none of the cash subscribers knew of the profit taken by Bigelow and Lewisohn on the sale to the corporation of the mining claims, and the facts remained undisclosed until in 1902 Bigelow and Lewisohn ceased to control the corporation.

The prayer of the bill is for a rescission of the sale of the mining claims and recovery of the consideration, or in the alternative for an accounting or for recovery of the damage suffered by the corporation.

The real question presented by the demurrer for want of equity is whether under the circumstances set forth in the bill Bigelow and Lewisohn were liable to the corporation as promoters for the secret profit made by them upon the sale of the mining claims. It has not been seriously denied that they were in every legal sense promoters of the plaintiff corporation. But the respondents have contended that the facts show no case of a promoter's liability, and the Circuit Court of Appeals so held, apparently on the ground that when the transaction complained of took place the only persons interested were the promoters themselves, and that it was immaterial whether or not other persons were immediately to become members of the corporation at the promoters' invitation, and as a part of their plan for completing the organization of the corporation. This view it is believed is wholly at variance both on principle and authority with the law regulating the duties and liabilities of promoters

None of the questions raised by the demurrers except the general want of equity were considered and they will not therefore be discussed.

The petitioner submits that a writ of certiorari should issue, because:

First. The case is one fit to be reviewed by this Court.

Second. The decision of the Circuit Court of Appeals is erroneous.

SYNOPSIS OF ARGUMENT.

FIRST.

The case is one fit to be reviewed by this Court.

I. The question involved is of general importance.

II. The conflict between the Circuit Court of Appeals and the Supreme Judicial Court of Massachusetts justifies a review.

III. The decision of the Circuit Court of Appeals is in conflict with that of the Circuit Court of Appeals for the Sixth Circuit.

SECOND.

The decision of the Circuit Court of Appeals is erroneous.

I. A corporation is entitled to relief in case of a sale made to it by a promoter, who himself controls the corporation, unless all persons interested assent.

II. The liability of the promoter exists independently of any misrepresentation, of the issue of a prospectus or of the particular method in which the transaction is carried out.

III. The fiduciary duty of the promoter is violated by failure to make full disclosure to persons who join the corporation as part of the original plan of promotion though they become stockholders after the transaction complained of.

IV. No acquiescence can validate the transaction unless all persons to whom the fiduciary duty is due join in such acquiescence.

V. In the present case Lewisohn and Bigelow failed to disclose their profit to persons to whom they owed a fiduciary duty.

1. The subscribers for the twenty thousand shares offered to the public were persons to whom the fiduciary duty extended.
2. The members of the Old Dominion Syndicate were persons to whom the fiduciary duty extended.

VI. The present case is entirely different from those cases in which the promoters take all the stock and subsequently sell part to other persons.

VII. The case at bar belongs to the class of cases in which a fiduciary relation existed to persons who did not acquiesce and consequently the transaction is voidable.

ARGUMENT.

FIRST.

The case is one fit to be reviewed by this Court.

I.

The question involved is of general importance.

The decision of the Circuit Court of Appeals is upon a point not only of great importance in itself, but one as to which it is extremely desirable that there should be uniformity of decision. In the industrial development of the United States the organization of large corporations is of common occurrence. It is seldom that the persons concerned in promoting such organizations are all inhabitants of one State, or can be proceeded against if need be in a single jurisdiction. The increasing frequency of suits to remedy wrongs done by promoters shows the necessity for the firm application of the rules of law determining promoters' liabilities. It is highly undesirable that the possibility of enforcing such liability should depend upon the fortuitous circumstance of the wrongdoer's domicile being in one State rather than another. In the Federal Courts, at least, there should be harmony of decision, and if there is any conflict among the State Courts the Federal Courts should be brought into accord with the better view.

II.

The conflict between the Circuit Court of Appeals and the Supreme Judicial Court of Massachusetts justifies a review.

The present case presents the extraordinary spectacle of two courts of last resort passing upon the same transaction, brought before them by substantially identical bills, reaching diametrically opposed results. The Circuit Court of Appeals has directly denied what the Supreme Judicial Court of Massachusetts has directly affirmed. The Circuit Court of Appeals has made no attempt to support its position except by a bare reference to certain cases as controlling authorities, without seeking to meet the grounds upon which the Massachusetts Court after elaborate consideration declared the same cases, or such of them as had then been decided, inapplicable.

If this conflict of opinion continues the result will be that, because Bigelow was a citizen of Massachusetts and subject to the jurisdiction of the Courts there, he will be held liable, and because Lewisohn was a citizen of New York and his executors are subject only to the jurisdiction of the Courts there, they will not be held liable.

While this Court cannot of course prevent such a conflict of opinion if the view of the Circuit Court of Appeals is correct, it

can by reviewing the decision prevent such a conflict if that Court has erred.

III.

The decision of the Circuit Court of Appeals is in conflict with that of the Circuit Court of Appeals for the Sixth Circuit.

The decision of the Circuit Court of Appeals is inconsistent with the principles laid down in *Yeiser* v. *U.S. Board & Paper Co.*, 107 F.R. 340. In that case the promoters on July 17, 1896, obtained an option to purchase a mill. On July 23d they formed a corporation to purchase the mill from them. The promoters and their associates subscribed for one quarter of the authorized capital and elected themselves directors of this corporation. A proposition from one of the promoters to sell the mill in question for one hundred thousand dollars, a price showing a profit of twenty-five thousand dollars, was accepted. A prospectus was prepared and subscriptions solicited. On December 16, 1896, the terms of the option, which had been renewed, were modified so that payment might be made partly in bonds. On December 19, additional subscriptions for stock which had been obtained were paid up to the amount of forty-five thousand dollars, all the subscribers but two supposing that the price of the mill which the company was buying was one hundred thousand dollars. On December 22, the transaction was consummated. On these facts the Court held that as rescission was impracticable the profit of twenty-five thousand dollars, represented by stock issued to the promoters and paid for by part of the price paid to them for the mill, could be recovered and this was done by the cancellation of the stock.

In the case just referred to, as in the case at bar, there were no persons interested in the corporation at the time the bargain giving the promoters their profit was made except the promoters themselves. If the Circuit Court of Appeals in the present case was right in holding that for this reason the corporation was not entitled to relief then the Circuit Court of Appeals for the Sixth Circuit was wrong in granting relief. There is no difference in the principles applicable to the two cases and no difference in the facts warranting any distinction. The issue of a prospectus could not, as will be more fully shown hereafter, affect the right of the corporation to relief. The use by the promoters of the money received for the property by them in paying for stock for which they had subscribed was perhaps of dramatic value but had no legal significance in determining their liability. The two cases are, it is submitted, radically inconsistent, and this conflict between two co-ordinate federal courts calls for review by this Court.

SECOND.

The decision of the Circuit Court of Appeals is erroneous.

I.

A corporation is entitled to relief in case of a sale made to it by a promoter, who himself controls the corporation, unless all persons interested assent.

The fiduciary position of promoters and the correlative right of the corporation in respect to transactions between it and its promoters is indisputable.

This Court in *Dickerman* v. *Northern Trust Company*, 176 U.S. 181, 204, gave the principle full recognition. The Court there said:

> "He is treated as standing in a confidential relation to the proposed company, and is bound to the exercise of the utmost good faith. Lloyd, Corporate Liability, 18; *Densmore Oil Co.* v. *Densmore*, 64 Penn. St. 43; *Bosher* v. *Land Co.*, 89 Virginia, 455. The promoter is the agent of the corporation and subject to the disabilities of an ordinary agent. His acts are scrutinized carefully, and he is precluded from taking a secret advantage of the other stockholders."

The doctrine thus laid down is no new departure. It merely recognizes as subject to well known rules a class of persons who have come into prominence comparatively recently. It involves only the application to transactions by such persons of the rules governing all other classes of persons occupying fiduciary positions.

The doctrine enunciated by this Court in *Dickerman* v. *Northern Trust Company* was not applied in that case, because no proceeding for such relief was before the Court, but it has been widely acted on by other courts.

In *Yeiser* v. *U.S. Board & Paper Co.*, 107 F.R. 340, certain individuals secured an option on a paper mill; they organized a corporation and sold the property to it at an advance of $25,000, paying for a part of the stock that they subscribed for with the purchase price paid by the corporation. The Circuit Court of Appeals held that the profit was illegal and that the corporation could recover the profit by annulling the title of the promoters to the amount of stock paid for with the money representing the profit.

In *Hayward* v. *Leeson*, 176 Mass. 310, promoters secured options on land; they then organized a dummy corporation which took over the options and in turn sold them to the East Tennessee Land Company, taking stock in the latter in payment. The promoters by this sale realized and took to themselves a profit of $700,000 in stock of the East Tennessee Land Company. The latter corporation having failed, the Court held that its receiver could recover in suits brought against two of the promoters for the profits made by them.

In *Old Dominion Copper Mining and Smelting Co.* v. *Bigelow*, 188 Mass. 315, upon the bill against Bigelow, setting forth the same facts as the present bill, the Court held on demurrer that the defendant was liable. Mr. Justice Loring said:

> "It was settled by the recent case of *Hayward* v. *Leeson*, 176 Mass. 310, that a promoter of a corporation stands in a fiduciary relation to the corporation of which he is a promoter." 188 Mass. 320.

In *Central Trust Co.* v. *East Tennessee Land Co.*, 116 F.R. 743, the soundness of the decision in *Hayward* v. *Leeson* was called in question, and the decision was explicitly approved by the Circuit Court.

In *Yale Gas Stove Co.* v. *Wilcox*, 64 Conn. 101, a promoter organized a corporation to acquire a patent. He caused the corporation to buy the patent at a much higher price than the owner was willing to sell for and took a large profit to himself from the excess. The patent was a valuable one and the corporation did not desire to rescind the sale, but it sued to recover the profit and the suit was sustained.

In other cases recovery has been allowed under like circumstances:

Chandler v. *Bacon*, 30 F.R. 538.
Burbank v. *Dennis*, 101 Cal. 90.
The Telegraph v. *Loetscher*, 127 Iowa, 383.
South Joplin Land Co. v *Case*, 104 Mo. 572.
Exter v. *Sawyer*, 146 Mo. 302.
Woodbury Heights Land Co. v. *Loudenslager*, 55 N.J. Eq. 78; 56 N.J. Eq. 411; 58 N.J. Eq. 556.
First Avenue Land Co. v. *Hildebrand*, 103 Wis. 530.
Hebgen v. *Koeffler*, 97 Wis. 313.

In England the rule is equally well established.

In *Erlanger* v. *New Sombrero Phosphate Co.*, 3 App. Cas. 1218, a syndicate formed by Erlanger purchased the lease of a phosphate island, formed a corporation to take over the lease, caused the directors selected by the syndicate to vote to purchase the lease at a large profit from a dummy who held it for the syndicate and at the same time to issue shares to subscribers. The company was not prosperous, and the profit made by the syndicate becoming known, suit was brought to rescind. It was held that the promoters had violated their duty in selling to the corporation without furnishing it an independent body of directors and making a full disclosure, and that the sale could be rescinded.

In *Gluckstein* v. *Barnes*, (1900) A.C. 240, promoters purchased the property of a corporation that was in liquidation. They organized a corporation to take over their purchase at a considerable profit, which was fully disclosed. Before completing the transaction they secured for themselves a large additional profit by buying up at a discount securities of the liquidating corporation

receivable in payment of the price they were to pay the liquidator. This profit was not disclosed. The House of Lords held that the promoters, by reason of their fiduciary position, were liable to the corporation they had organized for the amount of this profit.

II.

The liability of the promoter exists independently of any misrepresentation, of the issue of a prospectus, or of the particular method in which the transaction is carried out.

The liability of a promoter arises from the fiduciary position which he occupies. Relief is granted for breach of the duty imposed by that position. The duty of one acting in a fiduciary capacity is to engage in no transaction in which his interest and that of his beneficiary may conflict without putting the beneficiary in a position to act independently and with knowledge of all material facts known to the trustee. If the trustee would deal with the beneficiary or in a matter in which the interests of the beneficiary may be affected, and himself has an adverse interest, he acts at his peril unless he first sees to it that his beneficiary is independently represented and has the benefit of a full disclosure.

The foundation of the liability is not the necessity of redressing actual fraud, but of preventing the possibility of wrongdoing. This Court said in *Marsh* v. *Whitmore*, 21 Wall. 178, 183, 184:

> "The character of vendor and that of purchaser cannot be held by the same person. They impose different obligations. Their union in the same person would at once raise a conflict between interest and duty, and, constituted as humanity is, in the majority of cases duty would be overborne in the struggle. The law, therefore, wisely prohibits a party selling on another's account from becoming a buyer on his own at the sale, and will always condemn transactions of that character whenever their enforcement is attempted."

It is perfectly immaterial as far as the existence of the promoter's liability is concerned whether there is actual misrepresentation or not. Misrepresentation is merely an aggravation of the offence; there is a breach of duty as much in case of non-disclosure as in case of misstatement. This duty applies as much to a promoter as to any other person in a fiduciary position. To convict the promoter of a breach of duty justifying relief, it is no more necessary to show misrepresentation than in a proceeding for relief against an express trustee or an agent.

In the Erlanger case Lord Justice James in the Court of Appeals said:

> "A promoter is, according to my view of the case, in a fiduciary relation to the company which he promotes or causes to come into existence. If that promoter has a property which he desires to sell to the company, it is quite open to him to do so; but upon him, as upon any other

> person in a fiduciary position, it is incumbent to make full and fair disclosure of his interest and position with respect to that property. I can see no difference in this respect between a promoter and a trustee, steward or agent." 5 Ch.D. 118.

The liability does not rest upon deception or upon the sale being at too high a price. Mr. Justice Loring of the Supreme Judicial Court of Massachusetts, in dealing with the same facts now before the Court in the bill brought against Bigelow, speaking of the rights and liabilities of the promoters, said:

> "Being the absolute owners of it, the defendant and Lewisohn could do with that property as they pleased, — let it lie idle, work it, or sell it, as they thought best, and if they determined to sell it they could sell it to any one they might choose. If they chose to sell it to a stranger they could make the sale at arm's length, they could ask any price they pleased, and were under no legal obligation to state what it had cost them. On the other hand, if they elected to make a sale of it to one standing to them in a fiduciary relation, they were under an obligation to make a full disclosure to the beneficiary of all the facts known to them material to the property and the purchase, or see to it that the fiduciary had adequate independent advice. That is an obligation resting upon every fiduciary who makes a sale of his own property to his beneficiary, no matter whether it is a case of trustee and *cestui que trust*, guardian and ward, solicitor and client, or promoter of a corporation and the corporation itself." 188 Mass. 322.

As the foundation of the liability is the duty imposed by the fiduciary relation, it is clear that misrepresentation cannot be an essential part of the cause of action, and equally clear that the issue of a prospectus is immaterial. A prospectus is merely a public invitation or representation. If the prospectus is false, the effect is the same as if the persons responsible for its publication had made the same statements privately to each individual who has acted on the faith of the prospectus. A false prospectus issued by promoters may furnish convenient evidence of their breach of duty, if accompanied by evidence that no disclosure of facts was made except by the prospectus. But the mere issue of a false prospectus is not in itself proof of a breach of fiduciary duty or an essential part of such proof.

Misrepresentation, whether by means of a prospectus or otherwise, gives an individual cause of action at law to the person who has acted upon it to his detriment; breach of the fiduciary duty owing by a promoter to the corporation he represents gives no individual right of action to any single member of the corporation, but entitles the corporation, as representing its members collectively, to relief.

In *Erlanger* v. *New Sombrero Phosphate Co.*, 3 App. Cas.

1218, all the judges in all the courts were unanimous in holding that the corporation was entitled to relief for failure of the promoters to disclose the profit they were making in selling property to the corporation. Lord Blackburn carefully pointed out that this result was not based upon any misrepresentation or the issue of a prospectus, as to the effect of which he said:

> "If individuals were deceived by misrepresentations a case might exist entitling such individuals to be personally relieved against the consequences of such misrepresentations, but the company would not have any title to be relieved on account of such misrepresentations to individuals, especially if the misrepresentations were made by those who at the time represented the company." P. 1264.

And later in his opinion he said:

> "A great deal was said about the prospectus based on these letters being fraudulent. If this had been made out it would not have formed a substantive ground for relief to the company, but it would, I think, have been very material evidence that the board of directors who adopted and issued the fraudulent prospectus were under the undue influence of those who framed it." P. 1274.

In *Hayward* v. *Leeson*, 176 Mass. 310, there was a prospectus issued, and in the case of *Old Dominion Copper Mining & Smelting Co.* v. *Bigelow*, 188 Mass. 315, counsel for the defendant sought to distinguish the earlier case on that ground. The Court by Mr. Justice Loring, who wrote the opinion of the Court in both cases, repudiated such a distinction, and explained that the prospectus had nothing to do with the cause of action, saying:

> "The defendant has sought in the first place to distinguish the case at bar from *Hayward* v. *Leeson*, 176 Mass. 310, on the ground that in the prospectus in that case there was the false statement that the capital stock represented actual value, without inflation, while a substantial part of it had been issued to the defendants and their associates for nominal services. But that fact was not spoken of in the opinion as the ground of the decision. The opinion went on the broad ground mentioned above. This false representation was spoken of in connection with a contention on the part of those defendants that they were not liable because of a finding made by the Superior Court that the defendants did not conceal the transaction from the knowledge of future stockholders." 188 Mass. 322.

Counsel for the respondents in the Circuit Court of Appeals laid it down as the rule that a promoter's liability could exist only in the following cases:

> "(1) such promoter must have purchased the property with the funds of the company;

(2) or having previously purchased the property with his own funds reimburse himself from the funds of the company; or

(3) by the issuance of a prospectus containing inducements, false representations or concealments which tends to create a false impression and which amounts to misrepresentation."

Such a classification is purely empiric. Even if comprehensive it would be of no value because based merely on the presence of certain facts irrespective of the effect given those facts. No authority cited for the respondents sustained the proposition that one of the sets of facts enumerated was essential to create a promoter's liability. That actual misrepresentation or issue of a prospectus is immaterial has been shown both on principle and on the American and English authorities. The other two possible grounds of liability refer only to the precise method by which the secret profit is secured. By the first formula it is apparently meant that property resold by a promoter must have originally been purchased by him with the funds of the corporation in order to entitle the corporation to relief. Such a statement is contrary to all authority. No such state of facts existed in *Erlanger* v. *New Sombrero Phosphate Co.*, 3 App. Cas. 1218, or in *Gluckstein* v. *Barnes*, (1900) A.C. 240, or in any of the leading cases. Reimbursement from the funds of the corporation appears to mean nothing more than a sale to the corporation. If by using the word "funds" it is intended to limit the transaction to a cash sale the authorities are otherwise. In both the English cases last referred to the profit of the promoters was made in part from stock received upon a sale to the corporation; so in the two Massachusetts cases and in *Yeiser* v. *U.S. Board & Paper Co.*, 107 F.R. 340, the sale was partly or wholly for stock. To assert that the application of the principle giving relief for breach of a fiduciary duty is dependent on the form in which the unfaithful trustee receives his booty is to abandon discussion of the question from a juridical standpoint.

None of the many authorities referred to by the respondents as upholding their contention either in the form above quoted or as to the necessity of misrepresentation by prospectus or otherwise, support the proposition.

In *Salomon* v. *Salomon*, (1897) A.C. 22, "the one man company case," the sole owner of a business incorporated it, issuing all the stock to himself except shares issued to his nominees to qualify them as directors. There was no liability because no person except himself was interested in the transaction. The distinction between such a case and the Erlanger case or *Hayward* v. *Leeson* is not the presence or absence of a prospectus, but absence of any violation of fiduciary duty because of the acquiescence of all to whom any duty could be due.

In *Tompkins* v. *Sperry*, 96 Md. 560, the promoters purchased all the property transferred to the corporation and transferred it in

exchange for all the stock. Some part of the stock so received was afterwards sold by the promoters to others, but in such sales only the individual rights of the respective purchasers were involved. The Court distinguished the case from *Gluckstein* v. *Barnes* and *Erlanger* v. *New Sombrero Phosphate Co.*, on the ground that in those cases there was a secret profit taken:

> "The promoters had a secret profit in the land which the corporation was formed to take over, and they issued a prospectus which did not disclose that fact, and thereby induced other persons to subscribe to the stock." P. 581.

The real distinction between such a case as *Tompkins* v. *Sperry* and the cases from which the Court distinguished it lies not in the absence of a prospectus, as to the presence or absence of which the report of *Tompkins* v. *Sperry* is silent, but in the presence or absence of persons having an interest in the corporation who do not knowingly acquiesce in the transaction; and it is this distinction on which the Court in *Tompkins* v. *Sperry* relied.

The fact that the right of action for a breach of fiduciary duty rests in the corporation illustrates the same principle. For deceit caused by the issue of a false prospectus each individual who is deceived has, as pointed out by Lord Blackburn, his remedy against the persons responsible. It is immaterial whether the plaintiff in such a case is an original subscriber or a purchaser of stock, if his act is the natural and intended result of issuing the prospectus.

On the other hand, for a breach of the fiduciary duty of a director or promoter the corporation only is entitled to maintain an action. The fiduciary duty of promoters and directors to their corporation is of course in the last analysis a duty to the individuals who collectively form the corporation. But it is the corporation with whom the obnoxious transaction is made. The ground of complaint is not that the promoters have by false representations induced the individuals to go into an enterprise, but that they have caused the corporation to make a contract, giving the promoters a secret profit, in which those individuals have not acquiesced.

III.

The fiduciary duty of the promoter is violated by failure to make full disclosure to persons who join the corporation as part of the original plan of promotion, though they become stockholders after the transaction complained of.

The fiduciary duty of a promoter is to the corporation which he promotes, but the corporation consists of the individuals who are its members. If all the individuals acquiesce in the act of the promoter, the act is validated in the same way in which any *ultra vires* act is validated. The situation is the same as where a director is guilty of a like breach; the wrong is done to the corporation in the sense that the remedy is a suit by the corporation, but if all stockholders acquiesce there is no wrong. So in the case of a pro-

moter, if all the individuals who are affected by his breach of duty, all the individuals to whom collectively he owes the fiduciary duty from which the liability arises, acquiesce in his act, there is no wrong. But just as the fraud of a director cannot be condoned except by unanimous consent, so the wrongful act of a promoter is not validated except by the acquiescence of all concerned.

The duty of a promoter is to the persons who join with him in the enterprise. To all those who become original stockholders pursuant to the plan for promoting the corporation the promoter stands in a fiduciary relation. If any such person becomes a member of the corporation without the fullest disclosure in respect to transactions between the promoter and the corporation while controlled by him, the corporation may for want of acquiescence by such person obtain relief as to that transaction.

This Court in *Dickerman* v. *Northern Trust Co.*, 176 U.S. 181, 204, referring to the obligations of a promoter said:

> "he is precluded from taking a secret advantage of the other stockholders."

In *Veiser* v. *U.S. Board & Paper Company*, 107 F.R. 340, 348, the Court said:

> "In this country the Courts have accepted the essential principle laid down in the English cases, and hold, with scarcely any variation to the doctrine, that the promoter of a company stands in the relation of a trustee to it and those who become subscribers to its stock, so long as he retains the power of control over it."

In *Chandler* v. *Bacon*, 30 F.R. 538, 540, Judge Colt stated as the basis of recovery from promoters who on a sale to the company by a third person had by agreement received a number of shares:

> "The law forbids them, from their position, to secretly derive any benefit over other stockholders, and makes them accountable to the company for any profit so derived."

In *South Joplin Land Co.* v. *Case*, 104 Mo. 572, 579, the Court said:

> "And persons who subscribe for stock have a right to do so upon the assumption that the promoters are using their knowledge, skill and ability for the benefit of the company."

The duty of the promoter is not limited to those persons who join in the enterprise before the transaction complained of takes place.

A director stands in a fiduciary capacity to the stockholders for the time being, because they have in effect made him their agent. He is not accountable to the corporation upon a change of

stockholders for acts approved by those who were his principals. A promoter is responsible to those who join in his enterprise, because he has constituted himself their agent. In all his acts the promoter is representing all those persons who as a part of the promotion he brings into the membership of the corporation by invitation, express or implied, to join in the enterprise.

The fact that a promoter's duty is not limited to the persons who at the time of any particular transaction have actually joined the enterprise, but extends to all who join in pursuance of the original plan, has been universally recognized. Any other rule would effectually prevent relief in most cases, because in the usual course the transaction complained of takes place before there are any stockholders except the promoters themselves.

In *Dickerman* v. *Northern Trust Co.*, 176 U.S. 181, the facts in which appear more fully in the case before the Circuit Court of Appeals, 80 F.R. 450, promoters obtained options on certain manufacturing plants, all of which were taken in the name of or turned over to Stein. A corporation was organized by the promoters and Stein offered to the corporation the property under option, together with a working capital of two hundred thousand dollars, in exchange for all its stock and an issue of bonds. This proposition was accepted and the stock was transferred by Stein to or by his orders issued direct to the owners of the plants. This Court unequivocally declared the transaction a violation of the fiduciary duty of the promoters, but as the case before it was a proceeding to foreclose a mortgage given to secure bonds which were in any event enforceable in the hands of the holders, there was no relief to be granted.

Yeiser v. *U.S. Board & Paper Co.*, 107 F.R. 340, was a precisely similar case. The promoters secured an option, then organized a corporation which accepted their offer to sell the property at an advance. After this subscriptions for stock were taken and eventually the transaction was consummated as planned. Here it was the duty to stockholders becoming such after the contract complained of was made that gave a right to relief, and it was on that ground alone that relief was granted. While it appears that a prospectus was issued and used in obtaining subscriptions, there is nothing in the report to indicate that the prospectus was false, and no reference in the opinion of the Court to the prospectus or misrepresentation as a ground of relief.

In *Hayward* v. *Leeson*, 176 Mass. 310, the contract giving the promoters a secret profit was made at a time when there were no stockholders except the guilty persons and their accomplices. The Court said :

> "The persons to whom the promoters owe the duty which they owe by reason of their fiduciary relation are the persons who put their money into the enterprise at the invitation of the promoters, that is to say, the future stockholders." P. 320.

This view was affirmed by the same Court in *Old Dominion*

Copper Mining & Smelting Co. v. *Lewisohn*, 188 Mass. 315, involving the same facts as the present case.

In *Erlanger* v. *New Sombrero Phosphate Co.*, 3 App. Cas. 1218, the sale afterwards rescinded was made to the corporation before any outside subscriptions for stock were taken. The fiduciary duty, the existence of which neither the vice-chancellor nor any member of the Court of Appeals or of the House of Lords questioned, was a duty to persons subsequently becoming members of the corporation. There was a prospectus issued in that case, but as has already been pointed out it was not and it could not have been made the basis of the relief granted.

In *Gluckstein* v. *Barnes*, (1900) A.C. 240, 257, Lord Robertson, referring to the promoters, said:

> "The people for whom these gentlemen were bound to act were their coming constituents, the persons out of whose money they proposed to make their gain."

In the case of *Re British Seamless Paper Box Co.*, L.R. 17 Ch.D. 467, the point under consideration was clearly brought out. A corporation was there formed to take over a going business. No stock was issued to any outsider, and it was not intended so to issue any. Two years later additional stock was issued and in winding up proceedings it was held that towards the subscribers for this stock there was no duty on the part of the promoters, because the issue of that stock was no part of the original plan and promotion. Sir George Jessel based his opinion that there was no promoter's liability explicitly on the ground of

> "The subsequent allotment of a portion of the shares not being part of the scheme originally contemplated." P. 475.

At the same time he said:

> "You can defraud future allottees as well as present allottees." P. 472.

Lord Justice James said, speaking of the promoters:

> "If they were intending, though then constituting the whole company, that other people should come in afterwards to whom what had been done would be injurious, the Court would feel no difficulty." P. 477.

In *Re Leeds & Hanley Theatres*, (1902) 2 Ch. 809, Lord Justice Williams dealt with the same consideration, saying:

> "When it is said that the promoters stood in a fiduciary position towards the company, that does not mean that they stood in such a relation to these directors and these seven signatories. It means that they stood in a fiduciary relation to the future allottees of shares — to the persons who were invited to come and take up the shares of the company." P. 823.

And again:

> "I will not consider whether they made a disclosure to the directors who were their nominees. I do not think it matters whether they did or did not, for, as I have already pointed out, among their *cestuis que trust* were the future allottees of shares." P. 823.

The significant point in determining whether the promoters owe such a fiduciary duty to persons joining the corporation after a transaction between the promoters and the corporation, as will invalidate that transaction, is whether the bringing in of these persons is a part of the plan for promoting the corporation. If the promoters as part of their scheme must and do expressly or by implication, invite others to join in order that the scheme may be completely carried out, then as to those others they are in a fiduciary position which makes full disclosure necessary and vitiates any transaction by which, without such disclosure and knowing acquiescence, the promoters take to themselves any sort of secret profit.

IV.

No acquiescence can validate the transaction unless all persons to whom the fiduciary duty is due join in such acquiescence.

The principles laid down in the cases referred to as well as the actual decisions in those cases make it apparent that no acquiescence in a transaction by the corporate body while under control of the promoters themselves can be effective. In all of the cases cited there was acquiescence by the corporate body in the sense that all the persons at the time of the transaction composing the corporation acquiesced and knew the facts. But in each case those persons were themselves the wrongdoers or their representatives. Obviously, if a promoter is under a fiduciary duty for the protection of persons who may join after the transaction complained of, he cannot discharge himself from that duty by affirming through control of the corporation his own wrongful act.

Affirmance of or acquiescence in a transaction to be an effective validation must be by those persons to whom fiduciary duty is owing.

If the mere fact that a transaction was approved by all persons at the time members of the corporation was sufficient to make the transaction valid, then no question could have arisen in *Dickerman* v. *Northern Trust Co.*, 176 U.S. 181, for in that case when the contract between Stein and the corporation was made (80 F.R. 451) no one who did not acquiesce was connected with the corporation. So in *Erlanger* v. *New Sombrero Phosphate Co.*, 3 A.C. 1218, when the contract was made with the corporation, all persons then connected with the corporation acquiesced.

In *Hayward* v. *Leeson*, 176 Mass. 310, the same argument was used. In that case all the incorporators and all the persons who were then subscribers to the corporation sanctioned the payment

to the promoters of seven hundred thousand dollars in stock for their services. It was held none the less that this profit could be recovered, because pursuant to the scheme of the promoters further subscribers were obtained and stock issued to them. The Court said:

> "It is true that the vote, authorizing the issue of this stock to them as the profits which they were to have for the organization of the company, was voted unanimously by all the incorporators of the East Tennessee Land Company and by all who were then subscribers to its capital stock, that is, by all the persons who then had any interest in that corporation, in short it is true that the fact, that the promoters were to receive $700,000 of paid-up capital stock as remuneration for their services, was disclosed, and consented to, by all the persons who then had any interest in the corporation. But it is also true that at that time no person except the promoters had any interest in the corporation, barring one Mason, in whose name some of the options were subsequently taken, and who was plainly a mere nominee of the promoters: and that at that time no capital stock of the corporation had been issued to the public." 176 Mass. 319.

This doctrine was expressly affirmed in *Old Dominion Copper Mining & Smelting Co.* v. *Bigelow*, 188 Mass. 315, and the idea that *Hayward* v. *Leeson* proceeded on the ground of a prospectus having been issued was repudiated.

The essence of acquiescence is that it should follow disclosure. There can be no disclosure to the persons who themselves are the wrongdoers. If those persons alone are at the time interested, their knowledge of their acts cannot affect other persons to whom the duty of disclosure exists. Lord Macnaghten in *Gluckstein* v. *Barnes*, (1900) A.C. 240, 249, said:

> "With all deference to the learned counsel for the appellant, that seems to me to be absurd. 'Disclosure' is not the most appropriate word to use when a person who plays many parts announces to himself in one character what he has done and is doing in another. To talk of disclosure to the thing called the company, when as yet there were no shareholders, is a mere farce. To the intended shareholders there was no disclosure at all. On them was practised an elaborate system of deception."

The same views were expressed in *Re British Seamless Paper Box Co.*, 17 Ch.D. 467, in which the whole doctrine was carefully considered. Sir George Jessel said:

> "I quite agree to this, that if promoters make an arrangement to get a profit for themselves out of what is apparently paid to the vendors, it is immaterial whether the contract with the vendors is approved of by the directors of

the company, who are the promoters, just before the allotment or just after: in both cases it is intended to cheat the future shareholders; and of course it makes no difference whatever that the persons who, at the time the allotment was made, were in fact the promoters or their nominees, knew of the fraud. You can defraud future allottees as well as present allottees." P. 471.

In the same case on appeal Lord Justice Brett said:

> "If when parties are promoters of a company and then become directors, and at the time when they are making a profit to themselves are intending to act not only for the then members of the company but for future members, and they keep it secret, they can be made liable to account by future shareholders under the 165th section." 17 Ch.D. 477.

And Lord Justice Cotton said the principle was:

> "that the directors stand in a fiduciary position to the whole company, that is, not only to the existing members, but to all whom they intend to bring in." 17 Ch.D. 479.

These views were approved in *Re Leeds & Hanley Theatres*, (1902) 2 Ch. 809.

V.

In the present case Lewisohn and Bigelow failed to disclose their profit to persons to whom they owed a fiduciary duty.

It has been shown that the fiduciary duty of promoters extends not only to those individuals who at the time of the transaction in question made up the complaining corporation, but also to all persons who afterwards as a part of the original plan became members of the corporation. It has been further shown that if any persons thus became members, and the promoters failed to perform this duty of disclosure, a right to relief enforceable by the corporation arose, and that it is immaterial in such case whether or not at the time of the transaction all persons at that time interested in the corporation acquiesced. It remains to show that in the present case persons did join the corporation in pursuance of the original plan of the promoters, and in order fully to carry out that scheme, to whom in consequence a duty of disclosure was owing, and that the promoters failed as to these persons to perform that duty.

1. The subscribers for the twenty thousand shares offered to the public were persons to whom the fiduciary duty extended.

The plan originally conceived by Lewisohn and Bigelow was to acquire control of the property of the Baltimore Old Dominion Company, to resell that property to a new corporation at a large

advance, and to furnish the new corporation with working capital by offering part of its stock for subscription (Record, p. 3, par. third). This plan was carried out precisely as planned. Lewisohn and Bigelow sold to the new corporation on July 11, 1895, all the property of the Baltimore Company, except its cash assets, and sold also the mining claims which are the subject of the present suit. The new corporation thus became endowed with property, but it remained necessary to provide it with working capital. This necessity, which had been foreseen, was met one week later by offering stock to the public as originally planned. The whole operation was completed in September by the issue of all the stock, part for the mining property, part for the mining claims, and part for the cash subscriptions.

It is alleged in the bill and admitted by the demurrer that this means of providing a working capital was a part of the plan originally formed (Record, p. 3, par. third). Obviously it was necessary for the successful promotion of the corporation that it should be supplied with working capital. This might have been done wholly or in part by Lewisohn and Bigelow themselves offering to furnish the property and the working capital in exchange for stock. Such was the nature of the contract considered by this Court in *Dickerman* v. *Northern Trust Co.*, 176 U.S. 181, and there deemed to result in a plain violation of the promoters' duties.

By whatever rule the relation of the promoters to the subscribers for these shares is tested, the subscribers were entitled to the protection of the principles determining promoters' liability. At the time the sale here complained of was made, the promoters, to apply the language of Lord Justice James, "were intending though then constituting the whole Company that other people should come in afterwards to whom what had been done would be injurious."

These subscribers furnished a part of the capital embarked in the enterprise, capital as essential to the success of the enterprise, whether the promoters intended to achieve success in the stock market or in the operation of the mine, as the capital consisting of the mining property.

The fact that the shares were not offered for subscription until a week after the sale of the mining claims cannot be material. It was still the promoters who caused the corporation to offer the shares for subscription, and to do so was an essential part of their scheme and necessary to its success. Their fiduciary duty still continued. To hold otherwise is to deny the statement of Sir George Jessel that "it is immaterial whether the contract with the vendors is approved by the directors of the company, who are the promoters, just before the allotment or just after" (17 Ch.D. 467, 471) and to deny the possibility of a promoter defrauding future stockholders.

The fact that the money paid for these shares supplied working capital instead of being used in payment for the property is equally immaterial. It is not true that when promoters from their

own funds and from public subscription for stock provide a corporation with fixed and working capital, they can protect themselves from liability, whatever frauds they commit, by applying the contributions from the public to supplying working capital and not fixed capital. It is difficult to conjecture how such a rule could be defended or how reconciled with the view taken by this Court of the transaction in *Dickerman* v. *Northern Trust Co.*, 176 U.S. 181.

Counsel for the respondents have contended that the subscribers for these shares were only vendees from the corporation, and that it does not appear that they were informed of Lewisohn's and Bigelow's plan, or that the subscriptions were based upon anything done or intended by the promoters. The subscribers were vendees in the same sense as if they had subscribed before the sale complained of was made, in the same sense as every subscriber for stock upon the original issue by a corporation is a vendee, and in no other sense. The objection of the learned counsel seems to be based on an idea that the suit involves some complaint against the corporation for disposing of the stock. The real ground of complaint is that Lewisohn and Bigelow concealed from these subscribers the fact that they, Lewisohn and Bigelow, had made a contract very much to their own advantage, acting in anticipation of the subscribers becoming stockholders, and while intending them to do so. It is wholly immaterial in such a cause of action whether the subscribers knew that Lewisohn and Bigelow intended the proceeds of this stock to supply working capital or not.

The learned counsel for the respondents contended also that there could be no fiduciary relation between the promoters and these subscribers because such a relation must result, if at all, from some agreement to that end, express or implied, between two or more persons. In no case has it been held that the fiduciary relation of a promoter must arise from an express contract, or from an implied contract, except such contract, if one chooses to call it so, as may be implied from the mere transaction. In *Erlanger* v. *New Sombrero Phosphate Co.*, 3 A.C. 1218, for example, the shares of the company were offered, as here, for public subscription. The prospectus created no contract. If the prospectus was false and created a liability, it was, as Lord Blackburn pointed out, a liability to the individual and not to the company, yet the company was entitled to rescind because of the breach of fiduciary duty on the part of the promoters in not disclosing the profit they were making.

Finally, counsel for the respondents contended that there was no injury done to the corporation or to the subscribers. The wrong complained of is the sale to the corporation for 30,000 shares of its stock of property which cost the promoters nothing, and was practically valueless. The corporation parted for no consideration with shares that were worth $750,000. Yet it is said the corporation lost nothing. The subscribers for shares received shares which were necessarily worth less than if 30,000 other shares

in the corporation had not been issued for no value. If the promoters had sold that property without taking this profit, either the corporation would have had 30,000 shares less outstanding, and each share would have been so much the more valuable, or its assets would have been increased by the proceeds of 30,000 issued for value. The fact that the shares had a market value equal to the subscription price does not show that the subscribers lost nothing if, in fact, their shares would, but for the promoters' wrongdoing, have been more valuable. In an action at law for deceit the cost of the property to the vendor might, in the absence of a misrepresentation, be no concern of the subscriber, and this is the rule which counsel for the respondents lays down as controlling the present case, but it has uniformly been held in a question of fiduciary relations that the cost of property to a trustee who sells it to his beneficiary is a matter of concern to the beneficiary, of concern so deep that if undisclosed the sale must be set aside.

2. The members of the Old Dominion Syndicate were persons to whom the fiduciary duty extended.

The Old Dominion Syndicate was formed to provide money with which to purchase the property or stock of the Baltimore Old Dominion Company with a view to its re-sale. Lewisohn and Bigelow acted for the syndicate; with its money they purchased the stock in the Baltimore Old Dominion Company by control of which the sale to the corporation was made. The proceeds of the sale to the corporation was the property, in equity at least, of the syndicate, and 80,000 shares of stock were divided among its members in recognition of this right.

The members of the syndicate were not stockholders at the time the sale complained of was made, but it has been shown that this is immaterial if they were persons intended by the promoters to become stockholders. The members of the syndicate were such persons; they did become stockholders pursuant to the original plan of the promoters for carrying out the enterprise. They joined in the common enterprise of forming the corporation to take over the mining property.

The syndicate contract provided that the members should share *pro rata* in the profit of the sale to the new corporation (Record, p. 4, par. Fourth). They took the stock allotted them therefore as of right, precisely as if each had subscribed for that amount of stock, his subscription being payable by assignment of his undivided interest in the property transferred. Had the syndicate acquired the property which was transferred to the corporation and then agreed to transfer it in exchange for stock, the relation of such members would have been precisely the same as that of the complaining stockholders in *Dickerman* v. *Northern Trust Co.*, 176 U.S. 181. What they might have done directly, the syndicate, as a matter of convenience, did indirectly; each member by his contribution became entitled to a share as *cestui que trust* instead of as tenant in common. Lewisohn and Bigelow managed the syndicate, but they were responsible to its members.

The stock allotted to the members of the syndicate came to them exactly as if given in satisfaction of a subscription made for them by their managers.

It has been objected on the part of the respondent that the syndicate contract was not with the corporation, created no relation between the corporation and the members, and, therefore, could not be the basis of any recovery by the corporation; that the syndicate members did not acquire their stock from the corporation but from the promoters, and that because the syndicate was formed to make a profit from the sale of the mining property, the members could not complain of another profit made by Lewisohn and Bigelow alone from the sale of the mining claims. All of these objections are founded on the misapprehension of the facts or of the rules of law applicable.

The syndicate contract is not relied upon as the basis for recovery by the corporation. That contract was made between the promoters and the syndicate members, each representing only himself. For a breach of that contract the remedy would not be an action by the corporation, but an action by the individuals concerned. That contract, however, entitled the syndicate members to become stockholders in the corporation. They did become stockholders. It was intended by the promoters that they should become stockholders and should furnish the money for acquiring the property sold. They are, therefore, within the class of persons to whom a fiduciary duty is due as much as if they had subscribed for shares instead of for membership in the syndicate subsequently to be converted into shares.

The members of the syndicate being then by virtue of the syndicate agreement in the same position as shareholders, the promoters as to them were under the usual fiduciary duty of a promoter. The sale of the mining claims was not a transaction governed by the syndicate agreement. It was a separate transaction with reference to which the syndicate members had the same right to disclosure as any other intended member of the corporation, a right founded not on the terms of their contract but on the obligation due to them as future stockholders, the same obligation adverted to by this Court in *Dickerman* v. *Northern Trust Co.* as protecting persons who pursuant to independent contracts with the promoters, contracts made when no fiduciary relation existed, were to become stockholders. When Lewisohn and Bigelow took their profit from the sale of the mining shares they did not violate the terms of the syndicate agreement, but they violated the duty owing to the syndicate members as future stockholders, made such by the rights given them through the syndicate contract.

The case of the syndicate subscribers is not analogous to that of persons who have by contract made while dealing with promoters at arm's length undertaken to accept a specified amount of stock out of a total specified capitalization in payment for their property. In the latter case if the specified stock is delivered there is no ground of complaint. The promoter in making his bargain has dealt with an independent person to whom he was under no duty

and the transaction with the corporation is merely a consummation of the preliminary bargains.

There is no evidence that in this case the syndicate members joined in a plan to make, to the extent of the profit shared by them, a profit not disclosed to other stockholders. If such were shown to be the case, it would not be material, because that profit is not now in question. Their complaint is that the promoters who as to them were under the usual duty of promoters took in a separate transaction a secret profit. They are in no way estopped as holding stock received from the promoters, because their right to stock arose from their subscriptions, and the shares they actually received came not from the promoters but from a man of straw who received for convenience and distributed directly to the persons interested the whole consideration received for the mining property.

VI.

The present case is entirely different from those cases in which the promoters take all the stock and subsequently sell part to other persons.

The decision of the Circuit Court and of the Circuit Court of Appeals apparently proceeded upon the theory that because at the time the transactions complained of took place the only members of the corporation were the promoters themselves, who necessarily knew of and acquiesced in the sale, therefore there could be no cause of complaint. This view proceeds upon a confusion between two vitally distinct classes of cases.

If the owners of property determine to form a corporation to take over the property and in pursuance of that plan sell to the corporation so formed, themselves taking all the stock, they act for no one but themselves. It is not a part of their plan for any one else to come in; no one joins with them in the enterprise; no one is interested but themselves; they have no beneficiaries; and they are under no fiduciary duty. Such a case was that of *Re Ambrose Lake Tin & Copper Mining Co.*, 14 Ch.D. 390.

If on the other hand the promoters organize a corporation to buy their property and as a part of their plan propose to have and do have others join with them, so that their plan is in part at least carried out by the use of other people's money, whether that money is used to provide the corporation with fixed capital or with working capital, then there are others interested; the promoters in such a case act for the persons whom they design to bring in; those persons are their beneficiaries; to those persons they owe a fiduciary duty; and for any breach of such duty those persons are entitled through the corporation to relief.

In the one class of cases there is a purchase of stock and no relation except that of vendor and purchaser. In the other class of cases there is a joint enterprise in which the subscribers for stock are interested with the promoters, the promoters act as the agents and representatives of all those interested, and there is a fiduciary relation. The distinction between the two classes of

cases has long been recognized. Mr. Morawetz after discussing the case of frauds by promoters of which *Erlanger* v. *New Sombrero Phosphate Co.*, 3 App. Cas. 1218, is typical, and pointing out the right of the corporation, as representing the collective corporate rights of the shareholders to recover, says:

> "On the other hand, in *Parsons* v. *Hayes*, and *Re Ambrose Lake, etc., Mining Co.*, the collective rights of the shareholders were not infringed. The charge made in these cases was, that the directors had issued the entire stock of the company as paid-up stock, for property worth less than the par amount. No person was injured in the least degree by these transactions. If the persons to whom the stock was first issued afterwards sold a portion of it, and deceived the purchasers by a false representation that the par value of the shares had been paid into the company's treasury, they would clearly be liable to the purchaser for the fraud. And under these circumstances the directors who issued the false certificates representing that the company's capital had been paid up according to law might perhaps be charged also by reason of their complicity. But in a case of this kind the plaintiff's claim would be merely for the damages caused by the deception, and the extent of the injury would depend in each case upon the price paid by the plaintiff for the shares, and their market value when the deception was discovered." 1 Morawetz on Private Corporations, 2d ed., Sect. 292.

All the cases relied upon by counsel for the respondents and all the cases relied upon by the Circuit Court of Appeals as showing that in the present case there was no wrong done the corporation, belong to the class of cases referred to by Mr. Morawetz. In all the transaction complained of was a sale to a corporation for its whole capital stock. All the stock was issued to the alleged wrongdoers. No other person was connected with the enterprise or became connected with it, and it was not a part of the plan that any other person should become connected with it except as a purchaser of stock from the promoters. All those persons who, by becoming members of the corporation, completed its formation, made it more than a skeleton, and constituted it a going concern, acquiesced in the transaction. No person became a member of the corporation as a part of the plan for its formation without full knowledge and acquiescence. No individual was injured except by paying too high a price for stock already issued and outstanding.

In *Foster* v. *Seymour*, 23 F.R. 65, one of the cases relied on, the bill alleged that the trustees of a corporation issued all its capital stock to themselves, in exchange for property owned by them, and "after such exchange of the capital stock, divided and distributed it among themselves, and sold it as fully paid stock to innocent purchasers, including the complainant." The Court necessarily held that the sale to the corporation was valid; the stock

might not be fully paid for, the persons who bought the stock subsequently might suffer from paying too high a price, but the vendors had made no profit except by selling, for more than it was worth, stock belonging to themselves.

In *McCracken* v. *Robison*, 57 F.R. 375, another case relied on, certain persons formed a railroad company, and had the corporation contract with the defendants that the latter should turn over the road fully constructed and equipped in return for all the capital stock and bonds. Simultaneously the defendants agreed to pay the promoters half the profit made from the sale of the stock and bonds. Subsequently for this latter agreement was substituted a promise to pay a specified sum. The defendants sought to avoid this promise on the ground of illegality. The Court held that no breach of fiduciary duty was shown. The only persons interested in the enterprise were the promoters themselves. Whoever became interested in the stock of the corporation acquired such interest only by purchase from the persons who contracted with the corporation.

Stewart v. *St. Louis, etc., R. Co.*, 41 F.R. 736, was a precisely similar case. All the stock of a railroad corporation was issued in payment for the railroad to the persons who controlled the corporation. No one else was concerned.

In *Parsons* v. *Hayes*, 14 Abbott N.C. 419, all the stock in the corporation was issued to the vendor, who, by agreement, turned over a part of it to the directors for their personal benefit. Subsequently shares were sold by them or by the vendor. The plaintiff was a purchaser of shares, and sought by a stockholder's bill to make the directors account for the difference between the par value of the stock issued and the real value of the property. The Court held that the suit could not be maintained.

In *Barr* v. *New York, L.E. & W. R.R. Co.*, 125 N.Y. 263, a suit was brought by a minority stockholder in another railroad company to enforce payment of rental by the defendant company. The plaintiff's right to sue was assailed on the ground that he received his stock under a contract that was fraudulent. The contract in question was for the construction of the road in exchange for all its stock and bonds. The construction contract was made for the benefit of a syndicate comprising all the directors and stockholders of the company. The Court said:

> "As the members of the syndicate were practically the company and composed the whole number of stockholders, there was no one to object." P. 273.

No one was concerned in the corporation except the members of the syndicate, and no one could or did become interested except by purchase from them. On this ground the Court held that the plaintiff's right to sue could not be impeached. The contract of lease on which the plaintiff sought to recover was impeached on the ground that it was made by the directors of the Erie Railroad Company, the defendant's predecessor, for the benefit of themselves as stockholders in the lesser corporation. The Court held that

though the contract was voidable in its inception, it had been ratified by knowing acquiescence.

In *Seymour* v. *Spring Forest Cemetery Assoc.*, 144 N.Y. 333, co-tenants sold real estate to a corporation, formed by them for the purpose, taking in payment bonds of the corporation. The Court held that the sale could not be impeached because the vendors were themselves all the persons interested.

> "If they were the vendors on the one hand, dealing with themselves in a corporate capacity on the other, they were also the sole beneficiaries to be affected, and could not defraud themselves. . . . As beneficiaries, the stockholders necessarily assented to all the details of the arrangement, and no just criticism is possible either upon the legality or morality of the transaction." 144 N.Y. 340.

In *Hutchinson* v. *Simpson*, 92 App. Div. 382, an attempt was made to recover stock taken by Moore and Schley, as a profit on the organization of the American Malting Co. The facts showed that Moore and Schley entered into contracts with various persons by which the latter undertook to take stock in a corporation to be formed for the purpose of acquiring various plants on which Moore and Schley had options. The plants were turned over with a specified sum in cash for working capital in exchange for all the stock in the corporation. Moore and Schley then distributed the stock among those who had agreed with them to purchase it, and retained a large surplus remaining as an undisclosed profit to themselves. Three out of the five members of the Court were of opinion that there was no cause of action, because the transaction by which the stock passed to persons who had agreed to take it was a sale to them by Moore and Schley, and not a contract between them and the corporation. The other two members of the Court were of opinion that in substance the transaction was a subscription for stock, and that Moore and Schley were liable as promoters. Judge Patterson, one of the majority, in concurring (p. 407), expressly approved the doctrines of law laid down by the minority, while holding them inapplicable to the facts. The case was taken to the Court of Appeals, but was settled before it was reached. It may well be questioned whether the decision of the majority of the Court as to the facts was well founded. There would seem to have been good ground for contending that in reality the persons who purchased stock from Moore and Schley were in substance original subscribers; but however this may be, the decision deals only with the interpretation to be put upon the particular facts of the case.

Insurance Press v. *Montauk F. D. Wire Co.*, 103 App. Div. 472, was similar to *Parsons* v. *Hayes*. All the stock was issued to certain persons in exchange for certain patents. No one was concerned in the transaction complained of except the parties to it. Outside stockholders, including the plaintiff, became such subsequently as purchasers.

Tompkins v. *Sperry*, 96 Md. 569, is much relied on by the respondents. In that case the promoters took all the stock of the corporation in payment for property which they transferred to it. They had purchased certain property, they sold it to the corporation for all the capital stock, and disposed of the latter for their own benefit. The Court said of the transaction:

> "It is entirely consistent with the exhibits on which the allegations of the bill rest that these gentlemen should have purchased the properties on their own account with a view to capitalize their combined value by turning them into the company in payment for its bonds and stock." 96 Md. 579.

Distinguishing the case from those in which a fiduciary duty is violated, the Court said:

> "The true test of the responsibility of parties occupying positions such as Sperry & Jones did in putting the brewing properties into the company in this case, is whether other persons than themselves hold stock in the company and are not made aware of the true state of facts, or are induced to come into it by concealment or misrepresentation of the facts, or have furnished all or part of the capital embarked in the enterprise and are misled or kept in the dark as to the actual transaction." 96 Md. 582.

The case of *Blum* v. *Whitney*, 185 N.Y. 232, is of the same character. There the Distilling Company of America was formed pursuant to a written agreement which stated that a certain amount of stock was to be issued for each of certain specified properties. The ground of complaint alleged was that one of the properties was acquired by persons interested in the formation of the Distilling Company of America at a price which gave them a profit. The Court of Appeals of New York held that the bill showed no cause of action because the distribution of the stock was expressly agreed upon by all the persons interested. The Court said:

> "The stockholders of the constituent companies and the individual defendants were the organizers of the corporation and became its first stockholders; they dealt wholly between themselves as sellers and buyers, organizers and corporations; no other persons had any interest in this initial transaction." P. 241.

Each of the persons who were interested in the original issue of stock deliberately assented, by becoming a party to the agreement, to the allotment of stock among the various properties to be acquired. The promoters who had themselves acquired the Hannis Distilling Company did not assume to decide for their associates the price at which that property should go into the new corporation. Their original proposal was that the Hannis Distilling Company should receive an amount of stock shown by the agreement,

and all persons who joined in the new corporation, exercising their independent judgment and discretion, voluntarily acquiesced in that allotment. The bargain for the benefit of the promoters was really made not between them and the corporation when the latter acquired their property, but between them and the several individuals who joined in the agreement to form the corporation, when the latter assented to the price proposed. The sale to the corporation was merely the consummation of the agreement already made, and in making that original agreement the promoters acted only for themselves.

The English authorities show the same distinction.

In *Salomon* v. *Salomon* (1897), A.C. 22, there actually was but one man interested in the formation of the corporation; he owned the corporation as he owned the business which was sold to the corporation. No profit which he took in making the sale to the corporation, no over-valuation of the property transferred, could affect any person.

In *Ambrose Lake Tin & Copper Mining Co.*, 14 Ch.D. 390, the owners of a mining enterprise formed a corporation and took all the stock in payment for a transfer of the mine. No one was concerned except the original owners of the property. No one could thereafter become concerned except by purchase from them. The Court held that as all persons interested had acquiesced the transaction was necessarily valid.

Re British Seamless Paper Box Co., L.R. 17 Ch.D. 467, followed the earlier case in holding that upon the formation of a private company, where no stock is to be issued except to persons acquiescing, the transfer to the corporation was valid. In neither case was any doubt cast upon the general doctrine that without the consent of all persons interested a sale by promoters may be impeached.

There is no conflict of legal doctrine between any of the cases referred to. In none of the cases relied on by the respondents are the principles laid down in the case of *Erlanger* v. *New Sombrero Phosphate Co.*, and the cases following it, questioned. The distinction between the two classes of cases is a difference in the facts, not in the law applicable to the facts. In each of the cases referred to, where liability was denied, the Court rested on the ground that all the persons concerned had acquiesced, including among the persons concerned all whom it was intended should come in. The only possible criticism of any of the cases is as to the interpretation put upon the facts in determining whether certain persons who had acquiesced, and had not been informed, were concerned in the enterprise, and therefore in the transaction complained of, or were merely dealing with the promoters as individuals.

VII.

The case at bar belongs to the class of cases in which a fiduciary relation existed to persons who did not acquiesce and consequently the transaction is voidable.

The respondents have advanced various grounds to distinguish the case at bar from those in which relief has been granted against promoters.

They have argued that the subscribers for the twenty thousand shares had no connection with the enterprise, but were virtually in the same position as subscribers for an increase of capital made at some indefinite future time. The argument disregards the fact that the subscriptions were obtained as part of the plan of promotion and to complete the transaction. The same argument would if sound have been fatal in the Erlanger case, in *Hayward* v. *Leeson*, and in *Veiser* v. *U.S. Board & Paper Co.* In all of those cases the subscriptions were taken after the contract complained of had been made.

The respondents have argued that because no prospectus was issued here the authorities referred to are inapplicable. But the alleged distinction is untenable in principle and has been expressly repudiated by Lord Blackburn in the House of Lords and by the Supreme Judicial Court of Massachusetts.

They have argued that the syndicate members cannot be regarded because they were not subscribers for stock and because their rights were regulated by the syndicate contract with which the corporation had no concern. The argument fails to take into account that while the syndicate contract imposed no fiduciary obligation on Lewisohn and Bigelow as promoters its effect was to make the syndicate members to all intents and purposes subscribers and as such entitled to the same protection as other subscribers. The syndicate contract was not, as in *Blum* v. *Whitney*, 185 N.Y. 232, an agreement made between independent contracting parties defining what each should receive. It was merely the means through which the members of the syndicate were introduced to participation in the enterprise practically as subscribers for stock and as such in the usual relation to the promoters. In *Blum* v. *Whitney* the contract was one by which each person contracting with the promoters accepted a bargain for the largest amount of stock that he could get knowing when he accepted what amount each of the others was to get.

Counsel for the respondents in their brief before the Circuit Court of Appeals declared that none of the original subscribers for stock and none of the syndicate members had been found objecting to the transaction in question, and that this showed acquiescence and should prevent the sale being inquired into now. The record contains nothing to warrant these assertions. The only inaction which could show acquiescence would be inaction with knowledge of the facts. It is alleged in the bill (Record, p. 15) that neither the subscribers nor the syndicate members knew of the facts and that until April 4, 1902, when Bigelow ceased to be president the

petitioner had no knowledge of information as to the profit made. It does not appear therefore that there was any inaction on the part of the syndicate members or of the subscribers except as a result of ignorance of the facts. Any argument based on the assumption of inaction with knowledge must be disregarded as involving an unwarranted assumption of facts not before the Court.

In the final analysis the appellees' argument is the bare proposition that upon the formation of the corporation with forty shares of stock paid in the fiduciary relation of the promoters ended and that from that time they were free to do whatever they themselves as the holders of the forty shares approved; that because the forty shares were the entire issued stock of the corporation at the time, therefore the acquiescence of the forty shares was the acquiescence of all persons interested. To support this proposition the appellees would have the remaining one hundred and forty-nine thousand nine hundred and sixty shares looked upon as stock reserved by the corporation for issue at some indefinite future time, although when the stock was actually issued one hundred and fifty thousand shares were issued, the prior issue of the forty shares being wholly disregarded.

Such a proposition is repugnant both morally and legally. It does not represent the business or the legal view of the actual facts, and it disregards an unbroken series of decisions.

Where, as in *Blum* v. *Whitney*, a certain amount of stock is designedly reserved for future use at some time after the transaction of forming the corporation and putting it in a position to transact its business is completed, the assent of all persons who up to the completion of the transaction are concerned may well be sufficient. The stock reserved is to all intents and purposes in the same situation as stock which might be authorized by future amendment of the articles of incorporation and is wholly unconnected with the inception of the enterprise. Such a case is utterly different from the position taken by the respondents that whenever any stock has been issued the assent of the holders is sufficient, although the issue is only the first step in one transaction.

From a business standpoint the "floating" of the plaintiff corporation was not completed until all the stock which was to be issued in order to put it in a position to fulfil the purposes of its incorporation had been issued. From a legal standpoint the same thing is true, and the promoters could not deal with the corporation for their own benefit without the assent of all persons who became members of the corporation in carrying out the plan for its complete organization.

LOUIS D. BRANDEIS,
WILLIAM H. DUNBAR,
Counsel for Petitioners.

Office Supreme Court, U. S.
FILED.
JAN 31 1907
JAMES H. McKENNEY,
CLERK.

United States Supreme Court,

OCTOBER TERM, 1906.

No. [redacted]206.

IN EQUITY.

THE OLD DOMINION COPPER MINING & SMELTING COMPANY,

Petitioner,

against

FREDERICK LEWISOHN ET AL.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

EUGENE TREADWELL,
Counsel for Respondent.

Supreme Court of the United States.

THE OLD DOMINION COPPER MINING & SMELTING COMPANY, *Petitioner*, *against* FREDERICK LEWISOHN *et al.*, *Respondents.*	**In Equity.**

RESPONDENTS' BRIEF.

ON PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT FOR THE SECOND CIRCUIT TO REVIEW THE DECISION OF THAT COURT AFFIRMING THE DECREE OF THE CIRCUIT COURT OF THE SOUTHERN DISTRICT OF NEW YORK DISMISSING COMPLAINANT'S BILL ON DEMURRER.

Certiorari is sought on the ground of conflict between the Federal Court and the State Court of Massachusetts.

There is no conflict between the Second and the Sixth Circuits.

The case cited by petitioner, *Yeiser* vs. *United States Board and Paper Co.*, 107 Fed. R., 340, is wholly inapplicable, presenting an entirely different situation and was decided upon different grounds (see Brief, *post*, p. 20).

Plaintiff's counsel never contended below that the case was directly in point.

The Federal Court is supported wherever the question has arisen.

See *post*, page// .

1. By other Federal Courts.
2. By State Courts.
3. By English Courts.
4. By Text Writers.

The Massachusetts Court is without support.

It would not seem necessary for this Court to take upon itself the consideration of the cause when its decision would not be controlling upon the sole dissenting tribunal.

In asking for the interposition of this Court the petitioner does not offer to jeopardize its right to recover, secured by attachment, in Massachusetts, and therefore should not be afforded an opportunity to succeed in New York.

The Petition is in error where on page 5 it limits the demurrer for want of equity to a part of the bill.

See Record, p. 21.

The petitioner's brief is in error where it states on page 24 that the sale of the mining claims was not a transaction governed by the syndicate agreement. The allegations of the bill distinctly include the mining claims in the syndicate agreement (p. 14, *fol.* 25).

The bill of complaint stripped of immaterial allegations, conclusions of law, and mere verbiage, presents a claim which may be concisely stated as follows:

Defendant's testator Leonard Lewisohn, together with Albert S. Bigelow, of Boston, Mass., representing themselves **and associates in a syndicate** (*fols.* 4–6, Par. Sixth ; *fol.* 8, pp. 5, 6 ; *fol.* 9, Par. Ninth ; p. 9, Par. Sixteenth ; p. 11, Par.

Eighteenth; *fols.* 20–21, 22, 23, 25), in May, 1895, bought and paid for certain mining properties of the Old Dominion Copper Company of Baltimore (*fol.* 8), and in June, 1895, acquired certain mining claims owned either by one Keyser, of Baltimore, or by the above-named Baltimore Company p. 5, *fol.* 8).

In July, 1895, Lewisohn and Bigelow organized a New Jersey corporation, the complainant (p. 6, Pars. Ninth and Tenth), with an authorized capital stock of 150,000 shares of the par value of $25 each, Lewisohn and Bigelow themselves or through their representatives subscribing for all of the stock necessary to complete the organization of the company, and furnishing it with a board of directors composed of themselves or their representatives in interest. Thereupon Lewisohn and Bigelow transferred to the company (p. 8, Par. Thirteenth) the mining properties previously acquired by them, receiving in return 100,000 shares of the company's stock. They also transferred to the company the mining claims above mentioned (Par. Fourteenth), known as the Keyser claims, and received in return an additional 30,000 shares of the company's stock.

The **associates in the syndicate were by agreement** to receive back their respective advances in stock or in cash at their option and to share *pro rata* in the profits of Bigelow and Lewisohn. At the time these transactions took place Lewisohn and Bigelow were directors of the complainant company and (Par. Eleventh), together with their representatives, constituted the entire board of the company and owned the entire issue of stock of the company, holding the same either in their own name or in the name of representatives wholly under their control. Thereafter and at a time not specified in the complaint—to obtain working capital, the company, still under the con-

trol of Lewisohn and Bigelow as its directors, was caused by them to offer and sell to the public at par (p. 9, *fol.* 15), 20,000 additional shares of capital stock, the remainder of the authorized capital stock of the company. It is further alleged that the mining properties acquired by Lewisohn and Bigelow from the Baltimore company and transferred by them to the complainant for the 100,000 shares of its capital stock, did not cost Lewisohn and Bigelow or the syndicate more than, or were not fairly worth more than $1,000,000 (*fol.* 18), and that the mining claims acquired by Lewisohn and Bigelow from Keyser and transferred by them to the complainant company for the 30,000 shares of its capital stock, cost Lewisohn and Bigelow nothing and were not fairly worth more than $5,000 (*fol.* 18). The bill also alleges that the shares of the complainant company so issued in return for the property so transferred to it as above mentioned were, at the time, *of the fair market value of $25 each* (*fol.* 20), *and continued for a long time thereafter to be of such or greater value; but no other property of any kind is claimed ever to have been acquired by the company*, nor is it alleged that Lewisohn and Bigelow or their associates in the syndicate ever parted with the stock, although the bill does state that by the transactions Lewisohn and Bigelow made a profit on the sale of the property of the Baltimore company of more than $1,500,000 (p. 12, Par. Nineteenth), and in addition thereto a profit on the mining claims of over $750,000. The complaint also alleges that no disclosure was made at any time either to their associates in the syndicateof the extent of profit made by Lewisohn and Bigelow or to any of the purchasers or subscribers for the remaining 20,000 shares additional stock (p. 10, *fol.* 18, p. 11), or to any purchasers thereof from them of any profit made by Lewisohn

and Bigelow in the transfer to the complainant company of the mining properties and mining claims above mentioned.

The complaint contains an offer of retransfer of the Keyser claims to the defendants (p. 16, *fols.* 29, 30), and prays for a rescission (*fol.* 30) of the sale of the Keyser claims and a return to the company of the 30,000 shares issued therefor, or in the alternative, the damages suffered by the complainant company.

Albert S. Bigelow is not made a party to the bill.

The foregoing constitute the pertinent allegations of the bill of complaint.

There are also many allegations (*fols.* 5, 8), inferences and conclusions (*fols.* 5, 6, 9, 15, Par. Fifteenth, *fol.* 25) which must be disregarded under the rule that a demurrer only admits the facts stated and such inferences as can be fairly drawn from them.

Magniac vs. *Thomson*, 2 Wall. Jr., 209, 254.
Lafayette Co. vs. *Neely*, 21 Fed. Rep., 738, 744.

Two demurrers were filed.

First.—To the whole bill.

Second.—To part of the bill.

The first is printed page 21 of the Record.
The second is printed page 22 of the Record.

The first demurrer is that the bill is without equity and that it is also multifarious, in that it sets forth different and distinct causes which are inconsistent and cannot properly be joined and prays for reliefs inconsistent with each other, and is altogether multifarious.

The second demurrer is to so much of the bill as

seeks to have rescission, and is based upon two grounds:

(1) That the bill does not state a case entitling complainant to rescission.

(2) That the bill on its face shows that Albert S. Bigelow is an indispensable party to a bill for rescission, and that he is not made a party to the bill.

The cause came on for hearing upon bill of complaint and demurrer at the February Term, 1905, of the Circuit Court. The demurrer was sustained and the bill dismissed by Judge Lacombe, whose opinion will be found reported in 136 Fed. R., 915.

Leave to amend was had and complainant filed the present amended bill, in which numerous changes appear, without, however, substantially changing the allegations as contained in the original bill

Defendants thereupon demurred.

Complainant's counsel on the argument of the demurrer at Circut to avoid the effect of the prior decision by Judge Lacombe contended that amendment to the bill had changed the cause of action.

Complainant's counsel asserted that the allegations as set forth in the old bill of complaint permitted the conclusion to be drawn that Bigelow and Lewisohn themselves, and not the company caused by Bigelow and Lewisohn, obtained the subscriptions to 20,000 shares of the capital stock of the company for working capital, and that such 20,000 shares of working capital so subscribed for were part of an amount of shares previously issued by the company to Bigelow and Lewisohn for property, and not the remaining unissued 20,000 shares of the 150,000 shares of the capital stock of the company after the issue of 100,000 shares to Bigelow and Lewisohn for the Baltimore Old Dominion

Company assets, and the 30,000 shares to Lewisohn and Bigelow for the Keyser Mining claims.

PLAIN LANGUAGE IN THE PREVIOUS BILL PRECLUDED ANY SUCH CONSTRUCTION.

Fifteenth Para., p. 9.
Para. Twenty-first, at p. 14, *fol.* 24.

The Circuit Court below, upon the argument, intimated that unless the former bill had been amended so as to present a substantially different cause of action from that passed upon by Judge Lacombe, the former decision would be followed.

No other pretended change in the amended bill was put forward by complainant's counsel, although repeatedly called upon by the Court on the argument to point out in what respect the present bill differed from that before Judge Lacombe.

The Circuit Court, HOLT, J., held the amended bill to be the same as the original bill and sustained the demurrer for want of equity on the authority of the previous decision of that Court by LACOMBE, J.

The Massachusetts Supreme Court in a similar suit in equity against Bigelow upon like bill and demurrer, overruled the demurrer.

The case is reported in 188 Mass., 315, and will be considered later in this brief (p. 33, *post*).

ANALYSIS OF CASE.

First.

There was no fraud upon the company.

The sale by the directors was made with the acquiescence of all concerned, and not by promoters in any sense upon which liability to the corporation or subsequent subscribers could be predicated (Brief, pp. 11–22).

Second.

The sale was made valid by the conscious acquiescence of all persons interested in the company (pp. 22–26).

I.—All the persons who joined in the enterprise acquiesced in the transaction.

1. The **syndicate members** stood in the shoes of the directors and were not persons to whom disclosure was necessary, being equally with the directors sellers to the company and sharing in the profits of the sale.

II.—Besides those acquiescing, no others joined as part of the original plan or enterprise (pp. 22–26).

1. The persons who subscribed for the 20,000 shares issued for cash did not join as part of the original plan or of any plan or enterprise, nothing being stated in the bill of complaint to show either information offered to them or any knowledge on their part of any plan or enterprise.

2. The enterprise joined in by the subscribers for the 20,000 shares was the enterprise as it then existed, namely, a corporation possessing mining properties with an authorized capital of which 20,000 shares remained unissued and were offered for sale by the company without statement or inducement of any kind.

Third.

Disclosure to the subscribers to the 20,000 shares was not necessary—they were simply vendees to whom the vendor (company or directors) stood in no

fiduciary relation, no statement being offered or questions asked (Post, pp. 29–31).

Fourth.

Lewisohn or Bigelow not being liable as promoters, the plaintiff corporation is not entitled to a rescission of the sale or a return of the consideration, or to an account of profits made by the sale.

I.—If the sale had been made by Bigelow and Lewisohn without full knowledge and assent of all parties interested and without disclosure of profit, rescission and return of the consideration would be the sole relief permissible, and only then where both of them were parties to the suit (pp. 51–61).

II.—No alternative relief can be granted, the property having been purchased with the private means of the promoters and exchanged for the stock of the company without misrepresentation (pp. 61-67).

Fifth.

Albert S. Bigelow is an indispensable party to this suit (p. 68).

I.—The bill is a bill for rescission.

II.—The relief sought cannot be granted without affecting the rights of Bigelow.

III.—Relief for rescission may not be granted on a several liability where the transfer was joint, as in the present case.

Sixth.

The bill is multifarious (p. 75).

I.—The bill asks for different reliefs inconsistent with each other.

1. The relief for damages as for a tort is inconsistent with relief for rescission. The former treats the transaction as valid, but requires damages; the latter treats the transaction as invalid and requires its rescission.

FIRST POINT.

Want of Equity.

There was no fraud upon the company and therefore complainant is not entitled, either to rescission, damages or profits.

The Bill alleges that at the date of the transaction sought to be rescinded Bigelow and Lewisohn owned *all the stock* of the complainant and constituted *the entire stockholding interest* of the company and received all of the stock of the company issued, including the stock issued by the complainant for the property in question.

Record, p. 6, *fols.* 11, 12, p. 7, *fol.* 13, p. 14, *fol.* 24.

UNDER SUCH CIRCUMSTANCES THERE WAS NO ONE WHO COULD IN EQUITY COMPLAIN, AND NO RESCISSION COULD BE HAD OR DAMAGES GIVEN.

I.

AUTHORITIES IN SUPPORT OF THE RULE.

1. Federal Courts.

Foster vs. *Seymour*, 23 Fed. Rep., 65; C. C. S, Dist. of N. Y.

McCracken vs. *Robison*, 57 Fed. Rep., 375; C. C. A., Second Circuit.

Stewart vs. *St. Louis, &c., R. Co.*, 41 Fed. Rep., 736, 738; C. C. D., Kansas.

DuPont vs. *Tilden*, 42 Fed. Rep., 87 ; C. C. N. D., Illinois.
Wood vs. *Corry Water Works*, 44 Fed. R., 146, 149, Pennsylvania.
Fort Madison Bank vs. *Alden*, 129 U. S., 373, 378.

2. State Courts.

New York. *Barr et al.* vs. *N. Y., L. E. & W. R. R. Co. et al.*, 125 N. Y., 263, 273.
Seymour vs. *Spring Forest Asso.*, 144 N. Y., 33.
Thornton vs. *Wabash Ry. Co.*, 81 N. Y., 462, 467.
Parsons vs. *Hayes*, 14 Abb. N. C., 419, 434 N. Y.
King vs. *Barnes*, 109 N. Y., 267, 268.
Insurance Press vs. *Montauk Wire Co.*, 103 App. Div., 472 N. Y.
Blum vs. *Whitney*, 185 N. Y., 232.

Illinois. *Higgins* vs. *Lansingh*, 154 Ill., 301, 331, 336.

Wisconsin. *Spaulding and ano.* vs. *North Milwaukee Town Site Co.*, 106 Wis., 481, 488, 489.

Indiana. *Coffin* vs. *Ransdell*, 110 Ind., 417, 425, 427.

Kansas. *St. L. F. S. & W. R. Co.* vs. *Tiernan*, 37 Kansas, 606, 633.
Walburne vs. *Chenault*, 43 Kansas, 356, 361.

Colo. *Arkansas, &c., Co.* vs. *Farmers, &c., Co.*, 13 Colo., 587.

Maryland. *Tompkins* vs. *Sperry Jones*, 96 Md., 560, 583.
Swift vs. *Smith*, 65 Md., 428, 435.

Nebraska. *Home F. Ins. Co.* vs. *Barber*, 60 L. R. A., 927, 935.

W. Virginia. *Merchants & M. S. B.* vs. *Belington C. & I. Co.*, 41 S. Eastern R., 390, 398.

Iowa. *Clark* vs. *American Coal Co.*, 17 L. R. A., 557, 561; 86 Iowa, 456; 53 N. W., 291.

Tennessee. *Divine* vs. *U. S. M. M. & Co.*, 38 South West. R., 93, 98.

3. English Cases.

In re Ambrose, L. R., 14 Ch. D., 390, 395, 396, 397, 399.

In re British Seamless Paper Co., L. R., 17 Ch. D., 467.

Salomon vs. *Salomon*, L. R. (1897) A. C., 22.

In re Baglan Hall Colliery Co., L. R., V. Ch. Ap., 346, 347.

4. Text Writers.

Cook on Corporations, 5th Ed., § 46, pp. 125, 135; § 47, p. 139, § 649, pp. 1461, 1462.

Morawetz on Private Corporations, 2nd Ed., Vol. I, § 290.

Pomeroy on Equity Jurisprudence 3rd Ed., Vol. 3, § 1092, p. 2116.

In *Old Dominion Copper M. Co.* vs. *Lewisohn et al, supra*, the Circuit Court, by Lacombe, J., held that there was no fraud, citing *Foster* vs. *Seymour* and *McCracken* vs. *Robinson*, *supra*.

In *Foster* vs. *Seymour*, *supra*, Wallace, J., says (p. 66):

"There was no fraud upon the corporation. At the time the scrip was exchanged for the mining property, the trustees were all there was of the corporation. There were no stockholders, unless they

were stockholders. What was done was done by the corporation. By the exchange the corporation got the mining property, and gave it back again to those from whom it got it, divided into 100,000 shares of the nominal value of $100 each (*The Ambrose Lake Tin & Copper Mining Co.* (*Ex parte Taylor*), L. R., 14 Ch. Div., 390; *re Seamless Box Co.*, L. R., 17 Ch. Div., 467)."

In *McCracken* vs. *Robison*, *supra*, the opinion of the Circuit Court of Appeals, by Wallace, J., in describing a similar situation, states at page 377:

"While directors in name they were principals in fact."

And later in the opinion condemns the defendants in the case for having built up a theory

"by confounding names with things and forms with substance."

In *Stewart* vs. *St. Louis, etc., R. Co*, *supra*, the Court, at page 738, says:

"All parties—directors and stockholders—assented to it; and surely, *subsequent purchasers of stock*, or the corporation itself, cannot now object to it (1 Mor. Priv. Corp., 290). It is true the vendors got a very large advance on the price they paid, but that is not alone the test by which the *bona fides* of the transaction is to be tried (*Id.*, 293). * * * As before remarked, parties taking stock afterwards in the company cannot complain of the purchase. The records of the company showed the transaction. It was not kept a secret. *There was no law compelling any person or municipality to take stock in the company unless they voluntarily chose to do so; and if they were deceived by the misrepresentations of the officers, their cause of action rests on that deception and not on an attack on the original contract of purchase*" (italics ours).

In re Ambrose, *supra*, James, L. J., says on page 395:

"In my view the company only gave back in

substance that which it was getting, and the fraud was not between the vendors and the company, the purchasers, but was a thing calculated to delude people into believing that the shares when got were something more valuable than they really were. * * *

What was taken back was the very thing that was given in exchange for it, calling it by different names and dividing it into different shares" (italics ours).

Brett, L. J., says, on pages 396–397 :

"The people who were representing this farce did not deceive themselves, nor were the people supposed to be buying nor the people supposed to be selling deceived. Is there any deception at all? *The whole was done by the same people; there was nobody in the limits of the company who was deceived in the least*" (italics ours).

Cotton, L. J., on page 399, says:

"But they are the only members of the company, and they were the only owners of the mine. Therefore, I cannot see how the company can complain of an act which all the members of the company were cognizant of, and which, as far as they could, they approved and affirmed. * * *

The remedy is a remedy of each purchaser of shares, if there were any such, who was deceived by the representations made by his vendor as to the constitution of the country" (italics ours).

In re Baglan Hall Colliery Company, L. R., V. Ch. App., the Court says :

"If strangers, no misrepresentation being made, choose to deal with a company without inquiry, they have no right to complain when it turns out that the shareholders are under no personal liability."

In *Barr et al.* vs. *N. Y., L. E. & W. R. R. Co.*

et al., supra, the N. Y. Court of Appeals, at page 273, said :

"We may concede that the contract was voidable, as a scheme concocted by the directors for sharing in the profits of construction ; but the difficulty is that all the members of the corporation were assenting to it. There was, therefore, in fact, no fraud practiced upon the company. Practically, the promoters of the corporation in this way placed a valuation upon the corporate properties and franchises, which the contribution and expenditure of their money created ; and the fact that they were created for an expenditure less than the par value of the aggregate issues of capital stock and bonds does not affect the question at all."

In *Seymour* vs. *Spring Forest Cemetery Association et al., supra*, the same Court says, at page 340 :

"While the technical form of this transaction was a sale by the eleven to the corporation, its substance was merely a change in the manner of holding. *The sellers were the buyers.* * * * *Whatever the price it wronged no one and could wrong no one.* * * * *No doctrine as to the dealing of a fiduciary agent with the property of his principal has any application to such a transfer as was made*" (italics ours).

In *Coffin* vs. *Ransdell, supra*, the Indiana Court says :

"If there was no fraud or concealment after the transaction in question was consummated, it is not perceived how the creditors were defrauded by reason of an overvaluation of the property, which was turned over in payment for the stock.

In *Blum* vs. *Whitney et al., supra*, recently decided, the New York Court of Appeals has reiterated the rule, citing the foregoing cases including the decision of Judge Lacombe in the present case.

The action was brought by the plaintiff as a stockholder of the Distilling Company of America, a New Jersey corporation, on behalf of himself and all other stockholders, after the refusal of the company to sue.

The defendants Whitney and others, owners of stock in certain distilling companies known as the "Constituent" companies, formed a syndicate which, by agreement, was to receive the stock of other shareholders of such "Constituent" companies, and to transfer all the stock, together with a sum in cash to be raised by them, to a corporation to be known as the Distilling Company of America, to be organized by the defendants with an authorized capital stock of $125,000,000. Of this authorized issue, $67,500,000 was to be issued for the stocks of the "Constituent" companies and the cash, leaving $57,500,000 unissued stock for future purposes. The defendants organized the Distilling Company of America with the above-mentioned authorized capital, themselves becoming its directors and constituting the entire board thereof, transferred the stocks of the "Constituent" companies owned by them or deposited with them together with the required cash, and caused the Distilling Company to issue to them in return $77,500,000 of the capital stock of the company, the entire issued stock thereof. There remained, therefore, of the authorized issue of the Distilling Company, $57,500 unissued. The complaint, among other allegations similar to those in the present action, contained a like allegation that the defendants, without the knowledge and consent of the depositing stockholders of the "Constituent" companies, or of the Distilling Company of America, or of its stockholders, appropriated to themselves a large amount of the stock of the Distilling Company without paying any consideration therefor and without reveal-

ing to anyone that they intended to make any profit or that they did make a profit in the transaction (Court of Appeals Cases and Points, N. Y. Law Institute Library, 1906, Vol. 2304, p. 21, *fol.* 81). The relief asked for was that the defendants account for the secret profit made by them or the proceeds thereof and for general relief. Defendants demurred to the complaint for want of sufficient cause of action. The opinion of the Court in sustaining the demurrer rests entirely upon the principle followed by Judge Lacombe in the present case, discussing it at length and with even additional emphasis. *The opinion, at page 242, also refers to the law governing promoters, which it holds has no application.* It is further to be noted that the attention of the Court of Appeals was called to the Massachusetts case *Old Dominion Copper Mining & Smelting Co. against Bigelow.*

N. Y. Court of Appeals Cases and Points, N. Y. Law Institute Library, 1906, Vol. 2304. Case, p. 334. Appellant's Brief, pp. 9, 12, 15, 40, 68. Respondent's Brief, Def'dt Whitney, pp. 40, 43, 99, 102.

II.

Petitioner's Cases.

None of the cases cited upon petitioner's brief in support of its contention are applicable to the present case, with a single exception of the Massachusetts case of *Old Dominion, etc., Co.* vs. *Bigelow*, later considered in this brief (*post*, p. 33).

None of them present a transaction wherein the

vendors dealt entirely with themselves and constituted the entire existing interest in the company, or had independently acquired the property and sold to the company for stock without prospectus or statement to subscribers.

In all of the cases cited by petitioner, the defendants were held liable as promoters. The rule to be deduced from all such cases is that before any liability arises either

1. Such promotor must have purchased the property with the funds of the company ;

2. Or, having previously purchased the property with his own funds, must have reimbursed himself from the funds of the company subscribed by by others ; or

3. Have issued of a prospectus containing inducements, false representations or concealment, which tend to create a false impression and which amount to a misrepresentation.

Gluckstein vs. *Barnes* (1900), A. C., 240.

Yeiser vs. *United States Board & Paper Co.*, 107 Fed. R., 340–347.

Where none of these conditions exist, there is no liability, there being no basis for any fiduciary relation.

THE CASES CITED BY PETITIONER HAVE ALL BEEN CONSIDERED IN RECENT CASES IN SUPPORT OF LIKE CONTENTIONS AND HELD INAPPLICABLE.

Blum vs. *Whitney*, *supra* ; see Appellant's brief, New York Court of Appeals Cases and Points, N. Y. Law Institute Library, Vol. 2304, Case pp. 10, 12, 14, 17, 25, 62, 67, 68.

Hutchinson vs. *Simpson*, 92 App. Div., 382; see dissenting opinion of Hatch, J., p. 407.

In *Yeiser* vs. *United States Card & Paper Company*, 107 Fed. Rep., 340, decided by the Sixth Circuit and relied upon by petitioner as conflicting with the decision herein, the defendants held an option for the purchase of manufacturing property for $75,000, formed a corporation and offered to sell to it the property for $100,000 in cash, issuing a misleading prospectus to subscribers to its stock by which the latter were led to believe that the property cost the defendants $100,000, and subsequently paying themselves the $100,000 furnished by the subscribers.

The defendants in that case were clearly liable as promoters, taking the money of the corporation obtained from subscribers to the stock thereof; furthermore, the defendants were liable under the false prospectus issued under the rule of *Gluckstein* vs. *Barnes* (1900 A. C., 240), and *the relief afforded* was damages, the *relief granted* in *Gluckstein* vs. *Barnes*, *supra*.

In the *Bigelow* case the Massachusetts Court refers to a single case, one of its previous decisions (*Hayward* vs. *Leeson*, 176 Mass., 310), as applicable to the present situation. In *Hayward* vs. *Leeson* the facts presented a different situation. The properties of the East Tennessee Land Co., when its stock was offered to subscribers, had not been acquired or paid for except in part. Mere options therefor had been granted. The money received from the subscribers was to be applied to the completion of the purchase. The same Court in the *Bigelow* case, at pages 326, 327, *confirms these facts and concedes the distinction.*

Furthermore, there was a false prospectus. The

opinion of the Court in dealing with the question of fraud refers on two separate occasions to this prospectus, quoting its alluring statements.

On p. 313 of the opinion the Court says:

"In this prospectus it is stated, among other things, that: 'The capital stock of this company represents actual value without inflation, but does not approximate the entire value of the properties on which it is based. It was the intention of the projectors and incorporators to shape this enterprise so that its stock should be as solid as that of a national bank. Over half a million dollars of its capital was subscribed before the company's organization, at par. Subscriptions for the remainder are now solicited.' And no other reference was made to the fact that the $700,000 of paid-up shares in question had been subscribed for and no statement was made as to the way in which those $700,000 of shares had been pain for and issued."

And again on p. 320 of the opinion the Court says:

"But there is a further finding which gives to the defendants' action a more serious character, and that finding is this. 'The prospectus * * * was issued with the consent and approval of the defendants * * * and was widely circulated among the general public.' That prospectus contains the following statement: '(Repeating the language of the prospectus above quoted.)' The defendants therefore not only did not disclose to their principals the fact that stock to the amount of $700,000 par value was issued to them and their associates as remuneration for promotion service, but a prospectus containing an incorrect and misleading, if not false, statement was issued with their consent and approval."

The opinion further states (p. 321) that, upon the *facts of the case*, the company could keep the property and sue the promoter under the rule of *In re Olympia*, 2 Ch. (1898), 153, which is the title below of *Gluckstein* vs. *Barnes* (1900), A. C., 240.

Gluckstein vs. *Barnes* has elsewhere been construed as resting upon the false prospectus (*Hutchinson* vs. *Simpson*, 92 App. Div. (N. Y.), 382, 388), and not applicable to the present case (*Old Dom. M. & S. Co.* vs. *Bigelow*, *supra*. See Brief, *post*, p. 37).

In the *Bigelow* case the Massachusetts Court states that the ground of the decision in *Hayward* vs. *Leeson* was the tort of the defendants in failing to disclose to the parties interested as beneficiaries the cost of the property or the profits to themselves as vendors. This assumes, *as was the fact in the Hayward case*, that there were such parties interested, namely, persons invited to subscribe cash for stock in the company, which cash was to be used to pay for the properties and thus complete the sale. In the present case the property was paid for, and the sale completed, by the vendors themselves. Therefore, whether *Hayward* vs. *Leeson* turned upon the question of a false prospectus or upon the purchase of the property with the money of the subscribers, is wholly immaterial, as neither of those grounds exist in the present case.

III.

The Syndicate Subscribers.

Petitioner rests a claim upon the rights of members of the syndicate other than Lewisohn or Bigelow.

The Massachusetts Court, in the *Bigelow* case, includes the members of the syndicate as stockholders who were defrauded.

Old Dom. M. & S. Co. vs. *Bigelow*,
Pet., p. 13, 188 Mass., pp. 326, 328.

The bill states that the syndicate members them-

selves participated in the profits of the entire sale of property inclusive of the mining claims, the subject of the present suit (Record, p. 4, *fol.* 6; p. 14, *fols.* 24, 25).

No cause of action in the right of subscribers, based upon secret profits by promoters can arise where the subscribers themselves shared in those profits as alleged in the present case (p. 6, *fol.* 18)

"it was understood *and agreed* between the members of said syndicate and said Leonard Lewisohn and Bigelow that * * * *and that the members of said syndicate should receive in cash or in stock of the new corporation to be formed to purchase said property as aforesaid the profit made by such sale to a new corporation pro rata according to their several subscriptions or interests.*"

See also p. 11, *fols.* 24, 25, as follows:

"and all of said action was taken * * * to enable said Leonard Lewisohn and said Bigelow *and such persons as they had associated with them to make a large profit* by the sale of said property of the Baltimore Old Dominion Company, *and of said mining claims and real estate* to the complainant corporation."

The syndicate stood in the same relation to the company as Bigelow and Lewisohn.

THEY WERE ALL SELLERS TO (THEMSELVES) THE COMPANY.

The present company, while frequently alleging that the syndicate subscribers were ignorant of the profits taken by Bigelow and Lewisohn, does not allege that they would not have subscribed if they had had such knowledge. The presumption is to the contrary from the universal acceptance by the syndicate members.

They are not found complaining.

Years after practical construction by actual performance and sharing in the benefits, *new parties* may not be allowed to come in with *new interpretations*, thus affording opportunity for *speculative suits* intended *to benefit such new parties alone*, and from which the original parties cannot by any possibility derive benefit.

The allegations are, therefore, wholly irrelevant, as no cause or claim of the syndicate or of any of its members could enure to the company; all claims of the members of the syndicate could only be between themselves, on the one hand, and Bigelow and Lewisohn on the other.

THE REMEDY FOR ANY FRAUD UPON THE SYNDICATE SUBSCRIBERS IS BY SUIT BROUGHT BY THEM INDIVIDUALLY.

Getty vs. *Devlin*, 54 N. Y., 403.
Lake Ontario R. R. Co. vs. *Curtis*, 80 N. Y., 222.
Thornton vs. *Wabash Ry. Co.*, 81 N. Y., 462, 467.
M. V. Co. vs. *Bradley*, 181 N. Y., 152.

THE SYNDICATE CONTRACT AFFORDS NO BASIS OF CLAIM ON THE PART OF THE COMPANY.

This precise question has been settled in important and well considered cases, where similar contracts were involved, the Court holding adversely to the company's title.

Hutchinson vs. *Simpson*, 92 App. Div. N. Y., 382.
Blum vs. *Whitney*, 185 N. Y., 232, 241.

In *Blum* vs. *Whitney* the fraudulent profit was

alleged to be $7,750,000 (Ct. of Appeals Cases and Points, N. Y. Law Inst. Lib., Vol. 230¼, § 19, *fol.* 76). The profit was alleged to result from turning in less property than agreed upon and taking more stock for one property owned by defendants than properly assignable thereto.

The N. Y. Court of Appeals, in *Blum* vs. *Whitney*, and the Appellate Division in *Hutchinson* vs. *Simpson*, both denied *to the company* any right arising from the syndicate contract upon the same ground, namely, that there was no relation of subscribers to the corporation, the N. Y. Court of Appeals specifically holding that the *law of promoters did not apply to the case* (185 N. Y., 242).

THE SYNDICATE CONTRACT WAS WHOLLY BETWEEN THESE PARTIES THERETO.

The transaction referred to in the nineteenth paragraph of the bill (Record, p. 12, *fol.* 21), relates only to a few instances and was not in reality a payment by the corporation to the subscriber, but a payment by Lewisohn and Bigelow to the subscriber. In form it was carried out through the company to avoid a double transaction. The double transaction avoided would have been payment by the company to Bigelow and Lewisohn of cash in return for like cash received by the company from the sale of stock furnished to the company by Bigelow and Lewisohn, which stock had been turned over to Bigelow and Lewisohn by such few of the syndicate as had elected to receive the cash. Thus, instead of the few syndicate members who exercised the option, delivering their stock to Bigelow and Lewisohn, and Bigelow and Lewisohn delivering the stock to the company which thereafter should sell the same for cash, the company in turn paying Bigelow and Lewisohn the cash, and Bige-

low and Lewisohn paying the same to the syndicate members, the company, at the direction of Bigelow and Lewisohn, received the stock and paid the proceeds directly to the syndicate members. The transaction is the same referred to in the same paragraph of the original bill of complaint, in more detail. It is not claimed that the *amended* paragraph creates any other or different interests than those of the syndicate members, or that by the allegations in *fol.* 21, to the effect that "Lewisohn and said Bigelow caused the complainant corporation to pay such amount in cash from the funds of the complainant corporation," any new or other interest or relation was created.

IV.

The 20,000 Shares.

The subscribers to the 20,000 shares paid their money for the right to participate in such assets as the company possessed at the time they were invited to subscribe.

That they received full value for their subscription is to be inferred from the statement in the bill that the shares of stock of the company were at the time *and for a long time thereafter* of the fair market value of $25 a share, the price paid by them (Record, p. 11, *fol.* 20) and even *of greater value.*

The subscribers to the 20,000 shares last issued were vendees purchasing without representation or inducement from their vendor (the Company).

THERE WAS NO OTHER RELATION BETWEEN THE PARTIES AND CONSEQUENTLY NO FOUNDATION FOR CLAIM OF ANY FIDUCIARY RELATION.

Liability could only arise from fraud perpetrated by the vendor in the sale to the subscribers.

IF ANY LIABILITY AROSE IT COULD ONLY BE ENFORCED BY THE INDIVIDUAL SUBSCRIBERS DEFRAUDED.

The allegations of plan and conspiracy by Lewisohn and Bigelow set forth in the complaint (Record, pp. 3, 4, Paragraphs Third and Fourth), and the subsequent allegation (p. 9, Paragraph Fifteenth) that Lewisohn and Bigelow, *pursuant to such* original plan and conspiracy, and *for the purpose* of furnishing working capital and funds to the corporation to develop its plants and other properties, caused the company to offer the remaining 20,000 shares of its capital stock, are wholly irrelevant and no inference could properly be drawn therefrom by the pleader or the Court, nor did the demurrer admit the correctness of any such inferences drawn by the pleader.

In the absence of allegation of any purpose being communicated to such subscribers, the repeated recitals thereof cannot help to make out a cause of action.

In *Ambler* vs. *Choteau*, 107 U. S., 586, the rule is stated by Chief Justice Waite at p. 591, as follows :

"The words 'fraud' and 'conspiracy' alone, no matter how often repeated in a pleading, cannot make a case for the interference of a court of equity. Until connected with some specific acts for which one person is in law responsible to another, they have no more effect than other words of unpleasant signification. While in this case the offensive words are used often enough, the facts to which they are applied are not such as to make the defendants answerable to the complainant."

See also

Van Weel vs. *Winston*, 115 U. S., at pp. 237, 238.

St. Louis, &c., Railway Co. vs. *Johnston*, 133 U. S., at p. 577.

Courts of equity will not be active in seeking for inferences in aid of a claim against an estate brought many years after the transaction and after the death of the principal participant therein.

Every inference against the existence of fraud will be had in favor of parties acting under the advice of counsel of high standing in the community.

The subscribers, or their vendees, are not now complaining. They have apparently acquiesced. There is no allegation in the bill that they would not have subscribed had they known of the secret profits. *New parties coming in long after*, cannot substitute their construction or their inferences as to what the subscribers themselves would or would not have done.

Lewisohn and Bigelow when they transferred their property to the corporation and took 130,000 of its shares in return therefor, took the risk of additional money being subscribed thereafter to and the corporation in developing the property. They could not know how much would ever be subscribed for working capital.

AFTER A SINGLE *cash* SHARE HAD BEEN SUBSCRIBED FOR LEWISOHN AND BIGELOW COULD NOT HAVE WITHDRAWN THE *property* FROM THE COMPANY.

When the offer of the 20,000 shares of stock was submitted to the public, all that had gone before was ended and was as nothing to such subscriber. To what extent, or what value, or from whom

acquired, or at what original prices at the various different times in which such properties had been transferred from one to another until finally lodged in the company, were questions with which the subscribers did not concern themselves.

THERE IS NO ALLEGATION IN THE COMPLAINT, NOR ANYTHING FROM WHICH AN INFERENCE MAY BE FAIRLY DRAWN, THAT ANY OF THESE MATTERS WERE EVER SUBMITTED TO OR INQUIRED OF BY THE SUBSCRIBERS.

The complaint frequently alleges that Lewisohn and Bigelow *purposed* to provide the company with working capital and *for this purpose* offered the 20,000 shares, but nowhere does the bill state that the subscribers were invited to *provide working capital* or that any statement was made *to them*, or any intimation *received by them* that they were subscribing working capital or contributing to a corporation which had any definite capital or which had issued any definite amount for properties acquired. The allegations of intent and conspiracy of Lewisohn and Bigelow, therefore, being in no way connected with acts performed in relation to the subscribers, can, as pointed out by Chief Justice Waite in *Ambler* vs. *Choteau*, *supra*, have no effect in determining such relations.

It is not pretended that the subscribers to the 20,000 shares dealt with Lewisohn and Bigelow, *but with the company*.

IT IS NOT ALLEGED THAT THE COMPANY, IN OFFERING THE STOCK, INFORMED THE SUBSCRIBERS OF THE PLAN OF BIGELOW AND LEWISOHN, OR INFORMED THE SUBSCRIBERS THAT THEY WERE TO PROVIDE WORKING CAPITAL.

For anything that appears in the complaint *the subscribers* may have presumed that the money supplied by them would go in whole or in part at some future time to the acquisition by the company of additional mining properties.

THE BILL DOES NOT STATE THAT THE SUBSCRIPTIONS WERE BASED UPON ANYTHING WHICH HAD THERETOFORE BEEN DONE OR INTENDED BY LEWISOHN OR BIGELOW, WHETHER DISCLOSED OR UNDISCLOSED.

For any damage to their rights the subscribers had their individual remedy, not the company.

If this Court shall casually wonder why parties should subscribe to stock in the absence of any statements, the answer is that the pleader had in reality an entirely different state of facts to deal with from what is disclosed by the complaint, upon which, however, a cause in equity could not have even been pretended.

The deficiency of the bill in this respect is not due to the oversight of the pleader, but to the impossibility of pleading such statement with any regard to the facts.

In other words, the actual transaction is not disclosed in the bill.

We do not make these statements as having any bearing upon the merits of the case but simply to place to its proper cause the lack of statement in the bill from which some inference could be drawn to account for the existence of any subscriptions to the 20,000 shares of stock.

THE FAILURE TO AVAIL OF THE AMPLE OPPORTUNITY AFFORDED BY THE LEAVE TO AMEND HAD AFTER THE DECISION OF JUDGE LACOMBE MUST BE TAKEN AS CONCLUSIVE AGAINST THE PLEADER.

Pomeroy on Equity Jurisprudence, 3rd Ed., Vol. 3, Sec. 1092, p. 2116, says :

"First Class. Directors Guilty of Fraudulent Misrepresentations or Concealments. Where directors or managing officers issue prospectuses, circulars or reports containing fraudulent misrepresentations or concealments concerning the company's affairs, and persons are induced by these documents to purchase shares of the stock, or to enter into contracts for their purchase, and thereby sustain a loss, such defrauded stockholders may, as has already been shown, either obtain the relief by repayment or rescission against the corporation, or may obtain relief against the fraudulent directors personally by means of an equitable suit for an accounting and repayment of the money, or by an action at law for the deceit. The equitable suits against the directors must plainly be brought *by the stockholders, and not by the corporation, since the wrong is not done to the corporate property or franchises, but consists wholly in a violation of the stockholders' proprietary rights in their shares of stock. Such a suit cannot be maintained by one stockholder suing on behalf of himself and all others similarly situated, the injury is several and individual; each defrauded stockholder must sue for himself*" (italics ours).

See also the distinction drawn by Morawetz on Private Corporations, 2nd Ed., Vol. 1, secs. 291, 292.

THERE WAS NO DAMAGE.

The bill alleges that the stock was worth par and over for a long time after (Record, p. 11, *fol* 20). In the case referred to in Pomeroy, *supra*, the relief would be limited either to a rescission and payment for 20,000 shares of stock of the company or to the damages sustained by the holders of the said 20,000 shares of stock, and would not extend, as is sought by the present bill, to a rescission or payment for 30,000 *other* shares of

stock or the difference between the value of such 30,000 *other* shares of stock at $25 per share, namely, $750,000, and the alleged value of the mining lands, as stated in the complaint to be $5,000. Obviously, likewise, there was no failure to disclose to any of the other stockholders, except to those subsequently subscribing to the 20,000 shares, as all the rest of the capital stock was issued to Bigelow and Lewisohn themselves. If any liability arises by reason of the company, through the control of Bigelow and Lewisohn, failing to disclose to the prospective purchasers of the 20,000 shares the actual cost to Bigelow and Lewisohn of the properties then held by the company and for which the 130,000 shares had been issued, it is a liability to such of the purchasers of the 20,000 shares as see fit to enforce their rights and to the extent to which they could establish their damage in case they elected to retain their stock and affirm the transaction. In the present suit it is sought to extend this right to the company itself and to multiply the liability six fold for the benefit not only of the 20,000 shares, but of the holders of the entire 150,000 shares of the capital stock of the company. The attempt to enlarge what could in any event only be an injury to the holders of 2/15 of the capital stock of the company to an injury to the entire capital of the company and obtain a recovery therefor, is contrary to all principles of equity laid down by the text writers and established by the highest equity tribunals.

V.

The Massachusetts Case.

Old Dominion Copper Mining & Smelting Co. vs. *Bigelow*, 188 Mass., 315 Petition, p. 7.

This suit was brought against Bigelow alone upon a bill of complaint in all respects like the original bill in the present suit, except the party defendant. The Massachusetts Court rests its decision in favor of the complainant company upon a cause of action for damages as for a tort of Bigelow as a director of the company in selling the property to the company without disclosing the cost thereof to him, and thus the Court held, contrary to the doctrine of the cases above cited, that there was fraud in the transaction and a violation of the duty owed by the director to an existing beneficiary with whom such director stood in fiduciary relations. The opinion, speaking of Bigelow and Lewisohn (Pet., p. 11, Rep., p. 322), contains the following:

"On the other hand, if they elected to make a sale of it to one standing to them in a fiduciary relation, they were under an obligation to make a full disclosure to the beneficiary of all the facts known to them material to the property and the purchase, or see to it that the fiduciary had adequate independent advice. That is an obligation resting upon every fiduciary, and makes a sale of his own property to his beneficiary, no matter whether it is a case of trustee and *cestui que trust*, guardian and ward, solicitor and client, or promotor of a corporation and the corporation itself."

The opinion further refers (Pet., p. 13, Rep., p. 324) to the decision of Judge Lacombe in the present case on the original bill, and to *Foster* vs. *Seymour* and *McCracken* vs. *Robison*, holding that

the doctrine of those cases is inapplicable to the present case, first because in the case of *Foster* vs. *Seymour* the bill did not seek to set aside the purchase for a failure to disclose a material fact in selling the property; second, because the entire stock of the corporations in those cases was issued to the defendant, while, as claimed by the Massachusetts Court, such was not the fact in the *Bigelow* case.

In the opinion there is, to say the least, some confusion as to whether *Bigelow* was liable as promoter or simply as trustee for a tort.

For example, the opinion almost at the beginning states (Pet., p. 10, Rep., p. 320):

"It is clear that on the facts stated the defendant was a promoter of the plaintiff corporation."

On page 326 Report, Petition, page 15, the opinion, in referring to an earlier case before the same Court (*Hayward* vs. *Leeson*, 176 Mass., 310) stated that the recovery in that case was for secret profits made by the promoters, and on page 327, that the rule in *Hayward* vs. *Leeson* applied to the present case. The opinion also previously reported on page 322, Peiition, page 12, declared that the rule in *Hayward* vs. *Leeson* had not been adopted because of false statements in a prospectus, although such appeared among the facts of the case, but upon the broad ground of failure by the trustees in the sale to his beneficiary to disclose the cost of the property.

Again, the opinion (last paragraph, Rep., p. 327 Pet., p. 16) says :

"On the case stated in this bill the defendant was a promoter of the plaintiff corporation ; being a promoter he stood in a fiduciary relation to it," etc.

On the other hand, the opinion distinctly states

and at full length (Rep., p. 321, Pet., p. 11) that Bigelow was not liable on the ground that the plaintiff corporation was entitled to the benefit of the original purchase as a beneficiary is entitled where the property was bought and resold, to the beneficiary, at a profit, and that Bigelow was not liable as a promoter for secret profits because he and Lewisohn had bought the property at a time when they were under no obligation to purchase it for the plaintiff company and also states further along on same page :

" The fact that the property was bought with a view of reselling it to a corporation to be organized for the purpose, and that that puppose was ultimately carried into effect, does not give to the corporation subsequently organized in execution of the original purpose a right to the benefit of the purchase."

Well-known cases on this point are cited in this connection, and the Court expresses its concurrence therewith.

The Massachusetts Court, however, in considering the relief to which the company is entitled, does not award the right to recover secret profits nor rescission, which could be granted in a proper case either against promoters or trustees who were not promoters, but proceeds to award a recovery, which in no case could have been had against promoters or trustees in the absence of false representations, namely, damages as for a tort.

The liability of Lewisohn and Bigelow as promotors will be considered later in this brief under the Second Point, at pages 51–61 (*post*).

The theory deducible from the opinion in the Massachusetts case would seem to be as follows :

Bigelow and Lewisohn were, as to the holders of 96,000 shares, liable as promoters, the holders of the 96,000 shares being made up as follows, Rep.,

p. 323 Pet., p. 13 : To the syndicate subscribers were allotted 80,000 shares of the 100,000 shares issued by the company for the property of the Baltimore Company, 20,000 of such 100,000 shares having been retained by Lewisohn and Bigelow as a profit. From the 80,000 shares thus allotted to the syndicate subscribers there is to be deducted 4,000 shares received by Bigelow as a member of the syndicate, leaving 76,000 shares allotted to the members of the syndicate other than Lewisohn and Bigelow. The 20,000 shares issued to the subscribers for working capital added to the holdings of the syndicate members other than Lewisohn and Bigelow make the total sum, as figured by the Massachusetts Court, of 96,000 shares. Liability as promoters is imposed upon Bigelow and Lewisohn for an imputed invitation by them to the intending subscribers of those 96,000 shares to become stockholders in a corporation thereafter to be formed to acquire property, without any disclosure of an intended profit by Lewisohn and Bigelow in the transaction.

The opinion further assumes that Bigelow and Lewisohn as such promoters in failing to disclose their intended profit were liable jointly not only to rescission in a proper case at the company's election, or jointly for the secret profits made by them, but separately for damages *in solido* as tort feasors, the damages to be based upon the difference between the actual value of the property and the amount of stock received.

The Massachusetts Court was in error in assigning to the syndicate subscribers the relation of fiduciaries to promoters. The Court evidently regarded such syndicate subscribers as beneficiaries invited to subscribe to shares of the corporation to be formed, and to acquire property thereafter to be obtained by Bigelow and Lewisohn, and has applied

the well settled principles of equity as to the rights of such subscribers and the liabilities of such promoters to the company. That such view was taken by the Massachusetts Court of the relations between the syndicate subscribers on the one hand, and Bigelow and Lewisohn on the other, and has controlled its decision is evident from the following language of the opinion:

The Court (Rep., p. 322, Pet., p. 12), taking up the defendant's contention, states it to be as follows:

"In the second place the defendant contends that the corporation cannot complain because the facts were known * * * to the holders of all shares of capital stock of the corporation outstanding when the contract of purchase here in question was made, and because the purchase was acquiesced in by them. * * * On the allegations of the bill the defendant and Lewisohn are to be treated as the owners of all the shares then outstanding, and therefore the transaction is taken to have been known and acquiesced in by all the then stockholders.

It is proper to pause here and see just what this contention means."

The opinion then proceeds (Pet., p. 12, Rep., p. 323) to state its construction of the statement of facts contained in the bill.

"When this contract was made on July 11, 1895, the authorized capital stock had just been increased from forty shares to one hundred and fifty thousand shares of $25 each, that is to say, from $1,000 to $3,750,000. Of the authorized capital stock only forty shares, or $1,000 had then been issued. As we have said, these forty shares are to be treated on the allegations of the bill as the property of the defendant and Lewisohn. The scheme of the defendant and Lewisohn as to this capital stock of $3,750,000, divided into one hundred and fifty thousand shares, was to issue eighty thousand shares (or $2,000,000) to the syndicate, or sell them to the public

for cash to provide $2,000,000 to be paid to the syndicate; twenty thousand shares (or $500,000) to themselves for their services and expenses as promoters; twenty thousand shares (or $500,000) to the public for cash for working capital; and the balance, thirty thousand shares (or $750,000) to themselves for the real estate here in question. And this scheme was carried out. In carrying it out no disclosure was made to the persons who took the syndicate's eighty thousand shares (except those of the eighty thousand issued to the defendant and Lewisohn as members of the syndicate), nor to those who took the twenty thousand shares sold to the public for cash for working capital. Of the eighty thousand issued to or for the syndicate it is alleged that the defendant received four thousand. It is not alleged that any of this eighty thousand were issued to Lewisohn. The contention is that inasmuch as the defendant and Lewisohn owned all the forty shares of the corporation, amounting to $1,000, outstanding when the sale here in question was made by them to the corporation, the corporation is barred from complaining that a full disclosure of the material facts was not made by them to it."

The Court then proceeds to discuss the decision of Judge Lacombe in the present case and of the Court in *Foster* vs. *Seymour et seq.*

The allegations of the bill do not justify the construction adopted by the Massachusetts Court. On the contrary, the construction of Judge Lacombe is the only fair construction, which was to the effect that the entire 130,000 shares, including the 80,000 shares allotted by Bigelow and Lewisohn to the syndicate subscribers, were paid to Bigelow and Lewisohn for the property of the old Baltimore Company and issued to them or for their account and at their direction (Record, p. 8, *fols.* 14, 15, p. 10, *fol.* 17).

The only statement in the complaint that any stock was issued to persons other than to Bigelow

and Lewisohn and their associates, is made with reference to the last 20,000 shares issued (p. 10, *fol.* 17). Furthermore, the statement of the complaint in describing the syndicate agreement (p. 2, *fols.* 6–7, p. 13, *fols.* 23–25), shows beyond question that not only was the stock to be issued to Bigelow and Lewisohn and by them divided amongst themselves and their associates, *but that profits were contemplated, and that all the members of the syndicate would profit at the expense of the corporation*, not merely Lewisohn and Bigelow.

The syndicate agreement was an agreement between the associates, *all of whom* were contemplating a profit in the sale to the corporation. If Bigelow and Lewisohn were promoters, their associate syndicate subscribers *were equally promoters* and can in no sense be considered as *their own beneficiaries.* The syndicate agreement was intended by all parties thereto merely to provide in part means for acquiring property to be sold thereafter to a corporation at a profit, and the rate of profit of the syndicate members was fixed by the agreement. So long as each syndicate subscriber received the *pro rata* shares fixed by the agreement, it was immaterial to him who received the balance of the 130,000 shares of stock issued for the property. If any of the subscribers failed to receive his share as fixed by the agreement he had a cause of action against Bigelow and Lewisohn.

So far as appears, Bigelow and Lewisohn carried out their agreement to the satisfaction of their associates, members of the syndicate. *None of them have been found to complain.*

Under the circumstances, therefore, the corporation has no claim. Like agreements and like claims of right on the part of the corporation have been before the courts in other cases and the company held to be without cause of action.

The precise question arose in a very important case and was decided adversely to the company by the Appellate Division of the First Department of this State.

Hutchinson vs. *Simpson*, 92 App. Div., 382.

Very recently a similar attempt was made to invoke on behalf of complainant corporation a like agreement involving a very large transaction between well-known persons in this State, and the New York Court of Appeals supported the rule of *Hutchinson* vs. *Simpson* denying any right of the company in the premises.

Blum vs. *Whitney*, 185 N. Y., 232.

The opinion of the N. Y. Court of Appeals, on p. 241, contains the following:

"The stockholders of the constituent companies (syndicate members) and the individual defendants were the organizers of the corporation and *became its first stockholders; they dealt wholly between themselves as sellers and buyers, organizers and corporation;* no other persons had any interest in this initial transaction; *if fraud had been practiced by any one of the organizers upon those associated with him, the cause of action would have vested in the party injured*" (italics and bracketed words ours).

We submit that the view thus taken by the New York Court of Appeals in *Blum* vs. *Whitney* is right and the view to be taken in the present case.

The Massachusetts Court treats the subscribers for 96,000 shares as if they were parties invited by Lewisohn and Bigelow to subscribe to the stock of the company to be formed to acquire property from Lewisohn and Bigelow without disclosure of an

intended profit by Lewisohn and Bigelow. The error of the Court in so considering the relation of the syndicate members to the transaction is clear and has been in detail above referred to.

The error of the Court in so treating the subscribers to the 20,000 shares is also clear.

The Court, in fixing the rights and relations of the subscribers to the 96,000 shares of stock, places great stress upon an alleged plan of Bigelow and Lewisohn at the outset to cause the company ultimately to issue such shares in the manner set forth. In fact, the Massachusetts Court relies solely upon this alleged plan of future action to give the character and relation to the holders of the 96,000 shares. No other ground for endowing those subscribers with the character, relations and rights allowed to them by the Court is even hinted at in the opinion.

NO SUCH PLAN WAS EVER COMMUNICATED TO THE SUBSCRIBERS FOR THE 20,000 SHARES, AND THE BILL OF COMPLAINT CONTAINS NO ALLEGATION NOR CAN ANY INFERENCE ARISE FROM ANY OF THE ALLEGATIONS THEREIN TO THE EFFECT THAT THE ALLEGED PLAN WAS EVER IN ANY WAY COMMUNICATED TO SUCH SUBSCRIBERS.

In this connection the Massachusetts opinion states at the bottom of page 320 as follows:

"It is not alleged here that the defendant made any misrepresentation as to the price paid by himself and Lewisohn for the property resold to the plaintiff at an advance, as was the case in *Gluckstein* vs. *Barnes* (1900), A. C., 240; S. C. below, *sub nominee; In re Olympia* (1898), 2 Ch., 153; *Hichings* vs. *Congreve*, 4 Sim., 420. Where one standing in a fiduciary relation makes such a misrepresentation it may well be that the purchaser

can keep the property and force the vendor to make good the representation by paying to him, the purchaser, the difference between what was in fact paid by the vendor and what he represented that he paid for it."

Therefore, so far as those subscribers were concerned, it was immaterial and afforded no ground of right in them that Lewisohn and Bigelow had ever formed the alleged plan. So far as disclosed by the bill, the subscribers to the last 20,000 shares issued were in the same position as if no plan had ever been previously formed by Bigelow and Lewisohn, or in fact in the same position as they would have been if Bigelow and Lewisohn had neither formed such a plan nor continued to be in any way connected with the company after the transfer by them of the property thereto. The materiality of the existence of such plan in any case would be contingent upon communication thereof to the subscribers of the 20,000 shares at or before the time when the subscriptions were made, and as an inducement to such subscription.

EXCEPT AS AN INDUCING CAUSE FOR THE SUBSCRIPTION, THE ALLEGED PLAN COULD HAVE NO EFFECT UPON THE TRANSACTION, AND IN THE ABSENCE OF KNOWLEDGE OF THE PLAN, THE SUBSCRIBER COULD NOT HAVE BEEN INDUCED THEREBY.

Disclosure of the plan and concealment of the intended profit are both essential to create any liability. Without disclosure of the plan, mere failure to disclose the intended profit afforded no inducement and created no liability.

There was no fiduciary relation between the parties.

There was no basis for any fiduciary relation.

The subscribers' money was not used either in

purchasing of property or in reimbursing the so-called promoters.

No statement was made or prospectus issued.

On the allegations of the bill, the subscribers were simply vendees, to whom the vendor (the company or the directors) owed no other duty than to answer fairly, if at all, any questions asked.

No questions were asked.

We have seen above that the Massachusetts Court confused the relation between Bigelow and Lewisohn on the one hand and the syndicate subscribers on the other by applying the law governing promotors to that relation, a confusion recently noted by the New York Court of Appeals (*Blum* vs. *Whitney*, 185 N. Y., 232, at p. 242).

This manifest confusion undoubtedly extended to the relation of the other subscribers.

The Massachusetts Court further erred in failing to construe the bill as one for rescission, and in granting relief for damages as for a tort, the rule having been elsewhere unanimously laid down that where the vendee sells property acquired in his own right without disclosing an intended profit the beneficiary, in the absence of misrepresentation by the vendor, may rescind, but may not affirm the transaction and ask for damages (see Third Point, p. 61, *post*, Brief).

In the *Bigelow* case the opinion of the Massachusetts Court on Pet., p. 12, Rep., p. 322, while holding directly contrary to the ruling of Federal Court on the hearing of the present case, and to the rule of *Foster* vs. *Seymour*, and other cases contains the suggestion (Pet., p. 13, Rep., p. 324) that it does not appear that the bill of complaint in the case of *Foster* vs. *Seymour* contained an allegation of failure by the vendors to disclose the cost of the properties transferred.

Such allegation would have been either super-

fluous or implied where *all the parties were cognizant of all the facts.*

To have alleged that the defendants did not disclose to themselves would have been as unnecessary as it was superfluous.

No cause can be predicated upon an allegation of a failure to disclose *what all the parties interested knew.*

> Am. & Eng. Ency. of Law, 2nd Ed., Vol. XIV, p. 113, subd. 5, and authorities cited.

That the distinction raised by the Massachusetts Court in commenting upon *Foster* vs. *Seymour* is without basis, appears from the subsequent decision of the New York Court of Appeals in *Blum* vs. *Whitney*, where the complaint contained distinct allegations of failure by the vendors to disclose the cost of the properties transferred, and yet the Court of Appeals applied the same rule.

> Court of Appeals Cases and Points, 1906, N. Y. Law Institute Library, Vol. 2304, *fols.* 50, 78, 79, 81, 82.

The opinion in the *Bigelow* case after referring to *Foster* vs. *Seymour* and *McCracken* vs. *Robison*, states (Pet., p. 14, Rep., p. 352) as follows:

"It is hardly necessary to point out the difference between such a case, where the scheme of the corporate organization does not contemplate there being any stockholders other than those who buy the stock issued in the transaction complained of, and a case like that now before us, *where ninety-six thousand* out of one hundred and fifty thousand shares are to be issued to persons to whom no disclosure was made" (italics ours).

And again (Pet., p. 1[illegible], Rep. p. 326) the opinion states:

"The case submitted to us for decision here by

the defendant's demurrer to this bill is a case where (disregarding the forty shares subscribed for to organize the corporation) the whole capital stock was one hundred and fifty thousand shares, of which fifty-four thousand shares were to be issued to the promoters for services and for the sale of the land here in question, *and the remaining ninety-six thousand* were to be issued to persons to whom the facts of this sale were not disclosed" (italics ours).

And again (Pet., p. 15, Rep., p. 327:

"Again the corporation is not barred because when the agreement was made it acquiesced in the trade and it was then, from a legal point of view, fully born. That was equally true in *Hayward* vs. *Leeson* and the cases cited in that case. The answer to that suggestion is that *from a business point* of view *the agreement* was not made to bind the corporation with a capital of *$1,000, which was the corporation then in fact in existence*, but to bind the corporation with a capital of $3,750,000. It was to that corporation with a capital of $3,750,000 that a full disclosure ought to have been made, and to that corporation no disclosure was made" (italics ours).

Thus the Massachusetts Court repeatedly rests its decision upon its construction of the relation of the syndicate subscribers to Bigelow and Lewisohn.

In Equity the Corporation Assented.

Lewisohn and Bigelow were in equity the corporation itself.

In *Tompkins* vs. *Sperry Jones*, 96 Md., 560, the Court says at p. 583 :

"They at the time held all of its stock and were the sole owners of the company. They were in

equity the company itself (*Swift* vs. *Smith, Dixon & Co.*, 65 Md., 428).

As stated by the Circuit Court of Appeals (Record, p. 31):

"A corporation can only act through the human beings who comprise it, it cannot be deceived or defrauded unless its stocholders and directors are defrauded."

EQUITY ONLY REQUIRES THE CONSCIOUS ASSENT OF ALL EXISTING INTERESTS IN THE CORPORATION.

The assent relied upon by the Court in *Foster* vs. *Seymour*, *Parsons* vs. *Hayes*, *Blum* vs. *Whitney*, and like cases, was not a statutory or technical assent, as required by the Massachusetts Court. It was not even the assent of the *corporation*, as required by the Massachusetts Court, but the assent of all the existing interests in the corporation. It was an assent in substance and not in form. It was an equitable assent, not a statutory or written assent.

Where all the existing interests are satisfied, equity neither regards the fictional entity of the corporation nor is concerned with its technical assent.

The assent required is of the corporation in existence, not the corporation as it may hereafter exist. The assent required was to bind the corporation as it existed upon the issue of the 130,000 shares of its capital stock. No other corporation then existed. No corporation then existed with a capital of $3,750,000. There was no such corporation. *A corporation is not a corporation of any stated amount of capital until all such stated amount has been issued or subscribed for.* It is of no relevancy that the company, by its articles of incorporation, was authorized to have a capital of $3,750,000

the company did not thereby become a corporation of that amount of capital. It could only become such corporation after the issue or subscription of that amount of capital. The requirement of the Massachusetts Court, therefore, rests upon technicality and not upon substance. The technical view was taken as of the corporation with its entire authorized stock, which was not in existence at the time of the transaction and which might never have come into existence. In fact, no binding technical assent could ever be obtained, because there would always be the power of the corporation to increase its capital stock (Record, p. 7, *fol.* 11). The disclosure called for by the Court in the Massachusetts case could in fact never have been made. There was not at the time a corporation with a capital of $3,750,000, and therefore no disclosure could have been made to such a corporation, nor does equity, as administered by the courts in *Foster* vs. *Seymour*, *Parsons* vs. *Hayes*, *Hutchinson* vs. *Simpson* and *Blum* vs. *Whitney*, require such disclosure. It has been sufficient, and all that has been required or could be required, that disclosure should be made to all the existing interests of the corporation.

In answer to the distinction made by the Massachusetts Court between the case then before it and the earlier cases of *Foster* vs. *Seymour*, etc., to the effect that in the *Bigelow* case all the stock issued at the time of the offer, was $1,000, it is only to be borne in mind that in those cases the qualifying shares held by the directors was not the only stock considered, *but the entire amount of stock issued as the result of the transaction*. In answer to the further distinction made by the Massachusetts Court that the existing issue in the *Bigelow* case was only $1,000, whereas *from a business point of view* the agreement was to bind the corporation with a capital of $3,750,000, the total authorized capital

stock, it is to be noted as before that the Court in *Foster* vs. *Seymour* and like cases was not controlled by the fact that the total *authorized* issue of the company was issued to the vendors but that the *entire issued* stock, including that issued in the transaction was issued to the vendors. The Court in those cases places its decision specifically upon the ground that the *entire issued* capital stock was issued to the vendors, not that the entire *authorized* capital stock was so issued.

There can be no reason for any such distinction, but that there may be no doubt on the point we refer, in this connection, to the recent case of *Blum* vs. *Whitney, supra*, where the New York Court of Appeals applied the same rule, citing the cases, and where the precise situation existed, namely, an issue to the vendors of the *entire issued stock*, but *not of the entire authorized* stock, there *remaining unissued* a large amount, namely, $57,000,000 of unissued stock of the Distillery Company of America, out of $125,000,000, its total authorized capital stock.

The true criterion in such cases therefore is whether the *entire issued* stock of the company, including *not only the qualifying* shares of the officers and directors, and *those already held* by the vendors, but *also the stock to be issued* in the transaction, was issued to the vendors, and not whether any remainder of the authorized issue by plan or intention may be thereafter offered to other parties.

The Massachusetts Court does not intimate, nor can it be properly contended, that the potential right of the company to issue the last 20,000 shares of its authorized capital of 150,000 shares constituted any difference or ground for distinguishing the rule of *Foster* vs. *Seymour et seq.*

THERE IS NO GROUND FOR SUCH DISTINCTION IN REASON.

A corporation may, as in fact the complainant did (Record, p. 7), by the vote of its directors increase its capital stock, so that the rule of *Foster* vs. *Seymour*, *Parsons* vs. *Hayes*, and other cases, was not applied to corporations beyond the possibility of such subsequent increase of capital and power to issue the same.

AMPLE AUTHORITY, HOWEVER, IS ALSO TO BE FOUND AGAINST SUCH DISTINCTION.

The same situation, namely, an unissued balance of authorized stock, existed in the case of the Distilling Company of America.

> *Blum* vs. *Whitney*, 185 N. Y., 232, 237; Court of Appeals Cases and Points, N. Y. Law Institute Library, 1906, Vol. 2304, fols. 43, 66.

If the rule contended for on behalf of the complainant in the present case were to be adopted, the Distilling Company of America would have been clothed with a claim against the organizers on account of the unissued balance of authorized stock. If the company had no such claim, and it was so held by the Court of Appeals, a subsequent issue of the balance of stock authorized could not create such claim in the company, but only in the subscribers thereto, *if the latter were deceived by false representations*.

Both on reason and authority the distinction contended for on behalf of complainant in the present case must be considered as unsound.

THE MASSACHUSETTS COURT IN THE BIGELOW CASE DID NOT RELY UPON SUCH DISTINCTION.

The Massachusetts Court was evidently controlled,

as we have seen above, by its construction of the rights of the syndicate members, and its view that such syndicate members were existing beneficiaries at the time of the sale to the corporation of the properties.

The opinion contains no reference to any difference between the situation existing after the issue of the 130,000 shares and before the issue of the remaining 20,000 shares, the Court relying, as we have seen, upon its view of the rights of the syndicate members, other than Bigelow and Lewisohn, to whom were allotted 76,000 shares of the first 100,000 shares issued.

SECOND POINT.

Defendants are not liable as promoters.

The established rule as to the liability of a promoter upon a sale to the company is as follows :

(1) To the corporation for rescission or for a recovery of secret profits, at the election of the corporation, where the property has been acquired by the promoter with the means furnished by the subscribers to the corporation, and the promoter has failed to disclose to subscribers any profit resulting to him in the transaction.

Chandler vs. *Bacon*, 30 F. R., 538.
Erlanger vs. *New Sombrero Phosphate Co.*, 3 App. Cases, 1278.

(2) To the company for rescission where the property has been acquired by the promoter with means independent of the corporation or the subscribers, but the promoter takes the subscribers' money in payment and fails to disclose his intended profit, and there has been no conscious assent of all the existing interests in the corporation ; but in such case the sole relief is rescission, and the company may not retain the property and recover the secret profits of the promoter, or damages based upon the difference between the value of the stock paid for the property, and the actual value of the property.

Beach on Modern Equity Jurisprudence, Vol. 1, Sec. 137, p. 151.
New Sombrero Phosphate Co. vs. *Erlanger*, 5 Ch. Div., 72, 83.
Erlanger vs. *New Sombrero Phosphate Co. & others*, 3 Appeal Cases, 1218, 1235.

In re Ambrose L. T & C. M. Co., 14 Ch. Div., 390.
In re Cape Breton Co., L. R., 26 Ch, Div., 221,
In re Cape Breton Co. (on appeal), L. R., 29 Ch. Div., 795.
Burland vs. *Earle*, Appeal Cases, (1902), 83 (Privy Council).
Insurance Press vs. *Montauk Wire Co.*, 103 App. Div., 472, 476 *et seq.* N. Y.

And many other cases.

(3) To the company for damages where the promoter, although acquiring the property by his independent means, makes false representations to the subscribers of the stock of the company as to the cost of the property to himself.

Gluckstein vs. *Barnes* (1900), Appeal Cases, 240, and other cases.
Yeiser vs. *U. S. Board & Paper Co.*, 107 Fed. R., 340, 347.

The acts of the defendants set forth in the complaint created no liability as promoters.

The term "promoter" is ambiguous, and in each case what the so-called promoter did must be ascertained before liability can be inferred.

In Lindley's Law of Companies, 5th Ed., 349, it is stated:

"Care must be taken not to be misled by words. Owing to the ambiguity in the meaning of the word promoter * * * it is unsafe to say that any particular person was a promoter of a particular company, and to infer from thence that he is liable to account to it as if he had been its trustee. The question in each case must be, what has the so-called promoter done to make himself liable to the demand

against him? What fraud or breach of trust has he committed or been a party to? If none, he is under no liabilty; if any, he is liable accordingly." * * *

In *Lindley, etc., Co.* vs. *Bird*, L. R. (1886), 33 Ch. Div., 85, at page 93, Lindley, L. J. uses the following language:

"Moreover, to say that James Bird was a promoter of the company and therefore liable to account to it, is calculated to mislead; for the word 'promoter' is ambiguous, and it is necessary to ascertain in each case what the so-called promoter really did before his legal liabilities can be accurately ascertained. In every case it is better to look at the facts and ascertain and describe them as they are."

Calling them "promoters" does not impose any liability.

In *Hutchinson* vs. *Simpson*, 92 App. Div., at page 398, the following language was used:

"I do not suppose that calling them promoters itself imposes any liability. It is the relation that in fact existed between the persons upon whom a liability is sought to be imposed and the corporation in whom vests the cause of action which is sought to be enforced that must determine the question as to the liability of the defendants. If, as between the corporation and the individual defendants, a fiduciary relation is estabilised, then of course there is imposed upon the agent or trustee the obligations that follow from that relation, but to establish that liability the relation must be shown to exist." * * *

Defendants were not promoters in the sense of the term as applied hitherto in any case in which they have been held liable as such. In all the cases where the Courts have held parties liable as promoters, the transactions complained of have been between the defendants and the future subscribers.

In the present case all of the transactions complained of took place between the defendants and themselves, and before there were any other subscribers, or any offer to future subscribers.

If any cause of action arose to the complainant company by reason of the acts of the defendants, it must have arisen at the time and before any other stock was offered or sold.

All the acts of the defendants had been done at that time. If no cause of action existed at the time of the completion of the transactions complained of, none thereafter could arise by reason of such previous acts.

Promoters as such only become liable because of their transactions with future subscribers to the stock of the company, whose money they solicit and obtain by false representations.

If the defendants, by causing the company to sell to subscribers the remaining unissued 20,000 shares of the stock, incurred any liability, it would be to such subscribers, and not to the company. The cause of such liability must have arisen after the transactions complained of had been entirely completed, and the injury, if any, caused by such acts would be to the subscribers and not to the company.

THE COMPANY WAS NOT INJURED BY THE ACTS OF THE DEFENDANTS IN CAUSING THE SALE OF THE REMAINING CAPITAL STOCK FOR WORKING CAPITAL.

The company received the cash in full.

If it had not been injured before the sale of the 20,000 shares, it was not injured by such sale; it was never injured, and therefore has no cause of action.

As to the 130,000 shares of stock issued for the properties and the mining claims, the defendants

were in no sense promoters. They owned the property individually; they organized themselves into a company; they dealt with themselves, and no one else; and they took back from themselves the stock of the company which they owned, in exchange for the property which they owned. They certainly were not promoters to themselves, and, up to and including the completion of the transaction by which they received the 130,000 shares of stock from their company, they had no transactions with anyone else. They, therefore, were not promoters as to anyone else. Nor can directors be held to be promoters merely because, for the purpose of obtaining capital to work the properties already acquired by the company, they offer to subscribers for cash the remaining unissued capital stock of the company at par, in the absence of any representations or statements in offering the stock. Nor does their intention so to do, had by them at the outset, before they organized the company, make them subsequently promoters.

NO FIDUCIARY RELATION EXISTS BETWEEN THE ORGANIZERS AND THE TECHNICAL CORPORATION.

Blum vs. *Whitney*, 185 N. Y., 232, 242.

Any liability must be predicated upon their relations with the subscribers. Their relations to such subscribers are determined solely by the transactions between those parties.

THE FIDUCIARY RELATION MUST RESULT, IF AT ALL, FROM SOME AGREEMENT TO THAT END, EXPRESS OR IMPLIED, BETWEEN TWO OR MORE PERSONS.

In re Ambrose Tin & Copper Mining Co., L. R. (1880), 14 Ch. Div., 390.

In re Coal Economizing Gas Co. (Gover's Case), L. R. (1876), 1 Ch. Div., 182, 187.

Erlanger vs. *New Sombrero Phosphate Co.*, L. R., 3 App. Cas. (1878), 1218.

Spaulding vs. *No. Milwaukee Townsite Co.*, 106 Wis., 481, at p. 491.

Old Dominion Copper Co. vs. *Bigelow*, 188 Mass., 315, at pp. 321, 322.

In *Brewster* vs. *Hatch*, 122 N. Y., 349, the Court recognized and expressly declared the direction which the inquiry should always take in determining whether a so-called promoter is or is not to be charged with the duties and disabilities of a fiduciary. The question always is, What was the contract of the so-called promoter, as gathered from the writings between the parties and the representations by which the exchange of papers was induced? The Court said (p. 359):

"The question is, was the relation between these litigants simply that of vendor and vendees of shares to be issued, or was it one of trust and confidence, binding the defendants to the exercise of good faith and to disclose such information as they possessed affecting the value of the property in which the plaintiffs were induced to purchase an interest * * * The true relation existing between these parties must be sought for in the contracts found by the Court to have been entered into, in the prospectus which the defendants put forth, and in the circumstances involved in the transaction."

Whether the intention to offer the remaining stock to subscribers for cash was formed before or after the directors formed the company and transferred the property to it, in no wise affects their relation to such subscribers. Whether such intention was formed before the organization of the company

or twenty years afterwards can in no wise constitute a liability as promoter. In all of the cases where promoters have been held liable as such to the company it will be noted that either an appeal has been made to subscribers before the corporation is formed to furnish the means to purchase the properties, or, after the corporation has been formed, to furnish cash to the company in return for its stock, the promoters reimbursing themselves for the property out of such cash or else the stock has been sold for cash under false representations.

The authorities cited by appellant are to the effect that where stock is sold *to obtain the means with which to purchase the properties* transferred to the company, relief may be had at the instance of the company in behalf of purchasers of such stock (Appellant's Brief, pp. 12, 13, 14, 24).

In those cases *prospectuses were issued* and the *money of the subscribers* was *used* to *acquire* the properties.

This distinction has been clearly pointed out and followed.

Tompkins vs. *Sperry, Jones & Co.*, 96 Md., 560, 581.

Salomon vs. *Salomon* (1897), A. C., pp. 22, 33.

Old Dominion Co. M. & S. Co. vs. *Bigelow*, 188 Mass., pp. 315, 321.

In *Tompkins* vs. *Sperry, Jones & Co.*, *supra*, the Court says (p. 581):

"The proposition that no fraud is involved in the transmutation of property suitable to the purposes of a corporation into the form of corporate securities in the manner adopted by Sperry and Jones in the present instance has been recently decided after a full examination and discussion of the subject by the House of Lords in *Salomon* vs. *Salomon*, App. Cases, 1897, p. 22, and was also adopted in *In re*

Ambrose Lake Tin Co., L. R., 14 Chy. Div., 390. * * *

There is no real conflict between these authorities and those relied on by the appellant. In *Gluckstein* vs. *Barnes*, L. R. App., 1900, p. 240, and *Erlanger* vs. *New Sombrero Phosphate Co.*, L. R., 3 App. Cas., 1218, the promoters had a secret profit in the land, which the corporation was formed to take over, and they issued a prospectus which did not disclose that fact, and thereby induced other persons to subscribe to the stock."

In *Salomon* vs. *Salomon & Co.* (1897), A. C. 22, the attempt was made to apply the doctrine of *Erlanger* vs. *New Sambrero Phosphate Co.* to a case in which all the stock and bonds had been originally issued to persons owning the property, as in the present case. The House of Lords, in distinguishing the *Erlanger* case, say (p. 33):

" But if every member of the company—every shareholder—knows exactly what is the true state of the facts, * * * no case of fraud upon the company could here be established. * * *

Assuming the price paid for the business was an exorbitant one, * * * when all the shareholders are perfectly cognizant of the conditions under which the company is formed and the conditions of the purchase, it is impossible to contend the company is being defrauded."

In *Old Dominion C. M. & S. Co.* vs. *Bigelow*, *supra*, the Massachusetts Court says (188 Mass., p. 321):

" When the defendant and Lewisohn bought this real estate they were under no obligation to make the purchase of it for the plaintiff corporation, which was not then in existence. Having bought the property at that time and paid for it with what, as between them and the plaintiff corporation, was their own money, they could have kept it or resold it to the plaintiff corporation or to anybody else, as they saw fit. The fact that the property was bought

with a view to reselling it to a corporation to be organized for the purpose, and that that purpose was ultimately carried into effect, does not give to the corporation subsequently organized in execution of the original purpose a right to the benefit of such purpose" (citing cases).

In the present case the complaint shows that Bigelow and Lewisohn, raised by the separate and independent syndicate contract, the moneys to purchase all the properties transferred to the complainant company, including the real estate, the sale of which is sought to be rescinded (p. 3, *fols.* 6–7).

The subsequent issue of 20,000 shares of capital stock by the complainant is stated in the complaint (*fols.* 5 and Par. Fifteenth, *fol.* 15) to have been for the purpose of obtaining working capital for the corporation and *no misrepresentation* as to the value of the properties already possessed by the company is alleged to have been made by Bigelow or Lewisohn in inducing these subsecriptions.

IF SUCH MISREPRESENTATION HAD BEEN MADE, BIGELOW AND LEWISOHN WOULD HAVE BEEN PERSONALLY LIABLE, *not to the company but to the subscribers* FOR THE DAMAGES SUSTAINED *by each.*

Tompkins vs. *Sperry, Jones & Co.*, 96 Md., 560, 581.

Pomeroy Eq. Jur., 3rd Ed., Vol. 3, § 1099, p. 2116.

The present case is radically different from all others where the defendants were held liable as promoters. In the present case the subscribers were offered stock in a corporation already organized and possessing the entire assets. Where the defendants were held as promoters the subscribers were invited to pay cash to the corporation to be used by the promoters to purchase the property from themselves.

In the present case the purchasers of stock trusted nothing to the discretion of the promoters. In the other cases the purchasers trusted everything to the discretion or statements of the promoters.

THERE WAS NO FRAUD UPON EITHER THE COMPANY OR THE SUBSCRIBERS TO THE 20,000 SHARES OR INJURY TO EITHER.

We have seen that there was no fraud *upon the company* in the issue of the 130,000 shares of stock to the defendants for the mining properties and for the mining claims. We have also seen that there was no fraud practised by the defendants by representations to the subscribers.

Neither was there any injury inflicted.

The company being the defendants simply gave to itself in return for what it took to itself.

It does not appear whether such subscribers sold their stock or have retained it. So far as the allegation of the bill discloses no actual injury has been suffered by any of the subscribers to the 20,000 shares.

It is idle to suppose that any one invited to subscribe to shares of a corporation already possessed of property would imagine for a moment that the property had been acquired by the corporation from the vendors thereof without profit to the vendors.

All that the intending subscriber considers in the absence of specific representations, is the probability of the company developing its property and increasing the value of their investment.

What the property cost is of no concern to the subscribers unless by a specific statement they are falsely informed and induced to purchase.

THIRD POINT.

Even if Lewisohn and Bigelow had failed to disclose to the company the cost of the properties, the complainant would not be entitled to damages but only, in a proper case, to rescission.

If a fraud had been practiced upon a company by directors thereof selling to it property, either at an over valuation or without disclosing the cost to themselves of the property, the relief open to the company is disaffirmance of the contract, when possible, and a suit for rescission, when jurisdiction can be had *over all the parties* to the transaction.

The failure of persons holding a fiduciary relation in dealing with their *cestui que trust* to disclose the cost of property sold is not such fraud as will permit the *cestui que trust* to retain the property and recover damages as for deceit.

Aliud est celare aliud tacere.

The cases to be found in the reports in which failure to disclose is held to be a ground for damages are, without exception, where concealment by tending to create a false impression, amounted to misrepresentation.

THE FAILURE OF THE TRUSTEE OR DIRECTOR TO FULFILL HIS DUTY AND DISCLOSE THE COST OF THE PROPERTY SOLD BY HIM, IN THE ABSENCE OF ANY MISREPRESENTATION ON HIS PART, DOES NOT CONSTITUTE CONCEALMENT OR DECEIT SOUNDING IN DAMAGES, BUT ONLY AFFORDS THE BENEFICIARY THE RIGHT, UNDER PROPER CIRCUMSTANCES, TO RESCIND THE TRANSACTION.

Beach on Modern Equity Jurisprudence, Vol. 1, Sec. 237, p. 151.

Erlanger vs. *New Sombrero Phosphate Co. & others*, 3 Appeal Cases, 1218.
In re Ambrose L. T. & C. M. Co., 14 Ch. Div., 390.
In re Cape Breton Co., L. R., 26 Ch. Div., 221.
In re Cape Breton Co. (on appeal), L. R., 29 Ch. Div., 795.
Ladywell Mining Co. vs. *Brookes*, L. R. (1887), 35 Ch. Div., 400.
Bentinck vs. *Fenn*, L. R. (1887), 12 App. Cases, 652, 658, 659, 664, 671.
Burland vs. *Earle*, Appeal Cases, 1902.
Higgins vs. *Lansingh*, 154 Illinois, 301, 380.
Insurance Press vs. *Montauk Wire Co.*, 103 App. Div., 472, N. Y.
Re Lady Forrest Gold Min. Li't'd., L. R. (1901), 1 Ch. Div., 582, 588, 589, distinguishing *Gluckstein* vs. *Barnes*.

In Beach on Modern Equity Jurisprudence, Vol. 1, Sec. 137, p. 151, the author says:

"Restoring consideration — Compensation for benefits received.—The rule in regard to the dealings of a fiduciary was adopted to secure justice, not to work injustice; to prevent a wrong, not to substitute one wrong for another; and hence have arisen limitations upon its operation, calculated to guard it against evil results as inequitable as those it was designed to prevent. Therefore, while the party who has reposed the confidence may avoid the transaction, he cannot do so without restoring what he has received under it, or making proper compensation for the benefits accruing to himself. To permit him to cling to the fruits of the fiduciary's dealing, while seeking to avoid his act; to take the benefit of his contract and yet deny him

the right to compensation for actual value received, would be grossly inequitable and unjust, and would turn a rule designed as a protection into a weapon of offense and injustice."

In *Erlanger* vs. *New Sombrero Phosphate Co.*, *supra*, the Lord Chancellor, Lord Cairns, at p. 1235, says :

"The part of the case of the respondents which, as an alternative, sought to make the appellants account for the profit which they made on the resale of the property to the respondents, on an allegation that the appallants acted on a fiduciary position at the time they made the contract on the 30th of August, 1871, is not, as I think, capable of being supported, and this, as I understand, was the view of all the judges in the courts below."

In *re* *Ambrose L. T. & C. M. Co.*, 14 Ch. Div., 390, the Court says (p. 398) by Cotton, L. J. :

"* * * That the company are at liberty to treat these persons as trustees of the property for the company, and, treating them as trustees, to allow them only what they paid for the property, and if they got anything else out of the coffers of the company, to make them account for that. Neither on principle nor on authority can that be maintained, unless at the time when the so-called vendor acquired the property he either acquired it for the company or was in such a position of fiduciary relation to the company that any purchase made by him of property available for the company must be considered as a purchase made by him as a trustee for the company. * * * I can quite understand an action to set aside the contract altogether, but that is not the course adopted by the company. I can see no ground either on principle or authority on which the company can say, not seeking to set aside the contract : 'We will hold you as passing this to the company, not because you originally acquired it for the company, but because you entered into a contract to sell to the company which is not bind-

ing, and therefore we make another contract to take it from you for what it originally cost you, making you account for whatever else under that invalid contract you stipulated should be paid for it.' I am of opinion that this cannot be maintained, and therefore the order we have to deal with cannot stand."

In *re Cape Breton Co.*, L. R., 21 Ch. Div., 221, the Court, Pearson, J. (p. 230), cites with approval the reasoning of Lord Justice Cotton *In re Ambrose L. T. & C. M. Co., supra*, also the language of Lord Cairns in *Erlanger* vs. *New Sombrero Phosphate Co., supra*, and held that while the company might have the choice either to affirm the contract or rescind it, a third course proposed to be taken, namely, to keep the property and ask the vendors practically now to enter into a new contract and to be considered as having sold the property, not for the price at which they agreed to sell it, but for the price at which they themselves had purchased it, was a relief unknown to the Court and which could not be given.

Upon the subsequent appeal in the case (L. R. 29, Ch. Div., 795), the decision of the Court below was affirmed, Cotton, L. J., after full discussion, adopting the views of Justice Pearson below, and Fry, J., saying (p. 812) as follows:

"I think that the case is one in which the adoption of the contract by the principal puts an end, and ought to put an end, to any further rights against the agent. It appears to me that to allow the principal to affirm the contract, and after the affirmance to claim, not only to retain the property, but to get the difference between the price at which it was brought and some other price, is, however you may state it, and however you may turn the proposition about, to enable the principal against the will of his agent, to enter into a new contract with the agent, a thing which is plainly impossible,

or else it is an attempt on the part of the principal to confiscate the property of his agent on some ground which, I confess, I do not understand."

In *Burland* vs. *Earle*, *supra*, the judgment of the House of Lords and Privy Council was delivered by Lord Davey, who said (p. 98):

"Both courts have held that the re-sale was by Burland's (a director) advice and influence, and was made without disclosing to the company the price at which he had purchased. It was also held in the same court of appeal that Burland had bought the property with the intention and for the purpose of reselling it to the company. * * * But their Lordships do not think it necessary to pursue these topics, because they are of opinion that the relief prayed by the amended statement of claim and granted in the court below is altogether misconceived. There is no evidence whatever of any commission or mandate to Burland to purchase on behalf of the company, or that he was in any sense a trustee for the company of the purchased property. * * * Let it be assumed that the company or the dissentient shareholders might by appropriate proceedings have at one time obtained a decree for rescission of the contract. But that is not the relief which they ask or could in the circumstances obtain in this suit. The case seems to their Lordships to be exactly that put by Lord Cairns in *Erlanger* vs. *New Sombrero Phosphate Co.* (Lord Davey proceeds to quote the language of Lord Cairns hereinabove quoted.) * * * Reference may also be made to the judgments of Pearson, J., and Cotton and Fry, L. JJ., *in re Cape Breton Co. To rescind the sale is one thing, but to force on the vendor a contract to sell at another price is a totally different thing*" (italics ours).

The Supreme Court of Massachusetts, in holding contrary to the explicit rule and extended reasoning of the above cases, that, solely because of the failure of Lewisohn and Bigelow to disclose the cost to themselves of the property transferred, the com-

plainant company is entitled to retain the mining claims and at the same time to recover from Bigelow or Lewisohn the difference between the value which the Court may put upon those claims and the shares paid for them, cites no authority in its opinion nor does it afford any discussion or reason for its holding beyond the statement that Bigelow and Lewisohn were "promoters."

Being promoters does not, however, involve them in all sorts of liability (cases cited under Second Point), and the Massachusetts Court in its opinion points out (188 Mass., pp. 321, 322) that they were not liable for profits, having purchased the property with independent means not acquired from the company.

Nor does any rule laid down in the case of *Hayward* vs. *Leeson*, 176 Mass., 310, cited by the Court (where the same Court held the promotors of a corporation liable to account for the net profits because *of the issuance of a prospectus by such promoters inviting subscriptions to stock, the proceeds of which were used to purchase the properties*), render promoters liable in the absence of such prospectus, the promoters acquiring the property by their independent means.

The Massachusetts Supreme Court, in *Old Dominion C. M. & S. Co.* vs. *Bigelow*, 188 Mass., pp. 326, 327, says: Rt. p. 15—

"If in the case at bar the 96,000 shares not issued to the promoters had been offered to the public for cash to be used in buying the property of the Old Baltimore Company, and for working capital, and had been taken by them, the case at bar would have come directly within the decision in *Hayward* vs. *Leeson*."

The difference in the facts between the two cases is essential, and takes the present case out of the scope of the rule applied in *Hayward* vs. *Leeson*.

This difference has been clearly recognized and commented upon in the authorities above cited in this point.

These authorities emanating from the highest English tribunals, eminent text writers and the Appellate Courts of the States must be considered as outweighing that of the Massachusetts Supreme Court especially when they are accompanied by extensive discussion and sound reasoning upon the particular point and in the absence of discussion in the opposing opinion.

FOURTH POINT.

Albert S. Bigelow is an indispensable party in whose absence a bill for rescission cannot be maintained.

(1) The bill discloses the joint interest of Albert S. Bigelow and of Leonard Lewisohn, defendants' testator.

This disclosure is distinct, emphatic and repeated.

The rescission sought is of the transfer to the complainant of certain mines and mining claims known as the Old Dominion Mine, the New York Mine, the Keystone Mine, and a certain parcel of land in Arizona, all of which had formerly been owned by the stockholders of Old Baltimore Company, the title being held by one William Keyser (p. 3, *fol.* 4), and from him acquired by the said Bigelow and the said Lewisohn.

The complaint at *folio* 5 states that prior to May 24th, 1895, Bigelow and Lewisohn formed the plan of acquiring the said property held by Keyser; that (*fol.* 9, paragraph seventh) on or about June 13, 1895, Bigelow, in conjunction with Lewisohn, for the purpose of carrying out their plan made an agreement with Keyser.

"In pursuance of this plan and conspiracy *they* required said Keyser to undertake to convey said claims and real estate *to them* without payment of any additional consideration upon said executors assenting thereto."

And (*fol.* 10, paragraph eighth) that Bigelow and Lewisohn *for their common benefit* acquired from

Keyser the said property thereto standing in his name.

The complaint further states (*fol.* 10):

"Said conveyance was made to said Leonard Lewisohn and the title to said property was acquired by him for the common benefit of himself and said Bigelow, as hereinafter set forth, and as a part of the plan and conspiracy hereinbefore set forth."

The complaint further states (*fol.* 18):

"The stock of said Baltimore Old Dominion Company and said parcels of real estate were acquired in the manner aforesaid *with intent on* the part of said Leonard Lewisohn and *of said Bigelow* to sell said property of said Baltimore Old Dominion Company and said parcels of real estate for a much larger price."

The complaint further states (*fol.* 19):

"By the transactions above set forth *said Bigelow and* said Leonard Lewisohn carried out their said plan and conspiracy * * * and *acquired* * * * *for themselves as they claimed* * * * all the property conveyed by said Leonard Lewisohn to the complainant * * * thereupon did sell * * * and also sold * * * all the property conveyed to said Leonard Lewisohn." * * *

The complaint further states (*fol.* 28):

"Thereafter, to wit, on or about September 12, 1902, the complainant offered *to said Bigelow and to the respondents* to rescind the sale and conveyance to it from said Leonard Lewisohn of said parcels of real estate in Arizona, to wit, the parcels known as the Old Dominion Mine, the New York Mine, the Chicago Mine, Keystone Mine, and parcel of real estate," etc.

From the general tenor of the complaint the joint interest of Albert S. Bigelow and Leonard Lewi-

sohn, defendants' testator, in the property acquired and in its transfer to the complainant is apparent, but the joint interest is, as we have seen, in the portions above referred to, also distinctly set forth, so that no doubt is left in the mind of the reader that the transaction sought to be rescinded was a joint one on the part of Lewisohn and Bigelow.

In fact the complaint offers an excuse for omitting the said Bigelow as a defendant (*fol.* 29) based on his non-residence within the Southern District, or State of New York, in which the cause is brought.

The formal offer of the real estate to the complainant was made in the name of Lewisohn (p. 20), probably because the legal title thereto stood in his name, although the property had been, as the complaint repeatedly states, acquired by both Bigelow and Lewisohn for their common benefit, and that they (Bigelow and Lewisohn) sold the same to the complainant.

It will be noted, however, that the formal offer contained a reference to the interest of Bigelow and a request to pay the consideration, namely, 30,000 shares of stock, to Bigelow as well as to himself.

The bill setting forth a joint interest in the subject-matter in Bigelow makes him an indispensable party without whom rescission cannot be had.

Shields et al. vs. *Barrow*, 17 How., 129.

Wall vs. *Thomas et al.*, 41 Fed. Rep., 620.

Bell vs. *Donohoe and others*, 17 Fed. Rep., 710.

Chadbourn et al. vs. *Coe et al.*, 45 Fed. Rep., 822.

Ribon vs. *Railroad Companies*, 16 Wall., 446.

California vs. *Southern Pacific*, 157 U. S., 229, 249.
Barney vs. *Baltimore City*, 6 Wall., 280, 285.
Bank vs. *Carrollton Railroad*, 11 Wall., 624, 631.
Coiron et al. vs. *Millaudon*, 19 How., 113, 115.
Williams et al. vs. *Bankhead*, 19 Wall., 563, 571, 572.
Duchesse d'Auxy vs. *Porter et al.*, 41 Fed. Rep., 68, 69.
New Sombrero Phosphate Co. vs. *Erlanger*, L. R., 5 Ch. D., pp. 73, 83.
Cunningham vs. *Pell*, 5 Paige Ch., 607, 612.
Encyclopædia Pleading & Practice, Vol. 2, p. 98.
Old Dom. Co. vs. *Bigelow*, 188 Mass., pp. 315, 328, 329.

In *Old Dominion C. M. & S. Co.* vs. *Bigelow* (*supra*), the Massachusetts Supreme Court in its opinion, substantially conceded the indispensability of both Lewisohn and Bigelow as parties to a bill for rescission by *not granting rescission*, but allowing damages as for an equitable tort, and overruling the demurrer on that ground.

The Massachusetts Court thus practically concedes the indispensability of both Lewisohn and Bigelow to a bill for rescission by pointedly refusing to consider the demurrer in this particular (Pet., p. 10, Rep., p. 320, although the question was clearly raised by the demurrer of Bigelow. By refusing to consider the demurrer in that respect, and by resting its decision upon the ground that the bill stated other sufficient cause, namely for damages as for a tort, the Massachusetts Court must be con-

sidered holding in favor of rather than against the indispensability of both Bigelow and Lewisohn as parties to a bill for rescission.

The clear import of the Massachusetts decision is that a bill for rescission required both Bigelow and Lewisohn as the parties but that a bill for damages as for an equitable tort required only one of them, as either could be held *in solido* and the bill was sustained as one for the latter relief and not for rescission.

WHERE, AS IN THE PRESENT CASE, THE GROUND IS TO ENFORCE THE TRUST AND HOLD THE DEFENDANT TO ACCOUNT, ALL THE TRUSTEES SHOULD BE MADE PARTIES.

Story's Eq. Pleadings, 10th Ed., Secs. 210, 214.
Conolly vs. *Wells*, 33 Fed. R., 205.
Howth vs. *Owens*, 29 Fed. R., 722.

The averment in the bill to the effect that Bigelow is not a resident within the jurisdiction of the Court does not relieve the bill from the difficulty.

It is well settled that neither the Act of Congress nor the forty-seventh rule of equity enables the Court to make the decree prayed for in the absence of Bigelow.

Shields et al. vs. *Barrow*, 17 How., 129, 140, 141.
Coiron vs. *Millaudon*, 19 How., 113, 115.

In *Shields et al.* vs. *Barrow* (*supra*), the opinion of the Court (pages 140, 141 and 142) discusses at length the effect of the Act of Congress, F. Stat. at L., 321, passed February 28, 1839, and the 47th Equity Rule, and held that notwithstanding the

Act of Congress and the 47th Rule no decree for rescission could be made in the absence of one of the parties to the original contract.

In *Coiron et al.* vs. *Millaudon et al.* (*supra*), which was a suit to set aside a sale, the Court uses the following language (p. 115):

"Nicolet & Co., and Van Brugh Livingston and wife, the mortgage creditors, or their legal representatives, were therefore necessary parties to the bill, as any decree made in the case disturbing the sale may seriously affect their interests.

This objection has been anticipated in the bill, and an averment made that these parties were out of the jurisdiction of the Court. But it is well settled that neither the Act of Congress of 1839 (5 U. S. Stat. at Large, 321, Sec 1) nor the 47th Rule of this Court enables the Circuit Court to make a decree in a suit in the absence of a party whose rights must necessarily be affected by such decree, and that the objection may be taken at any time upon the hearing, or in the Appellate Court (17 How., 130; 1 Peters, 299)."

In *Wall* vs. *Thomas* (41 Fed. R.), the Court held (p. 622), as follows:

"Section 737 of the United States Revised Statutes does not affect the question. Notwithstanding that provision, the Court can make no decree affecting the rights of an absent person, and none between the parties before it which so far involves and depends upon the rights of an absent person that complete and final justice cannot be done between the parties present without affecting those rights (*Shields* vs. *Barrow*, 17 How., 130)."

The tender of the property by the complainant set forth in the bill of complaint (*fol.* 28) is to Bigelow and Lewisohn.

A conveyance of all of the property to Lewisohn's representatives would obviously deprive Bigelow of his rights in the matter.

On the other hand, no tender or conveyance of less than all the property can be made to either Bigelow or Lewisohn, the property not being capable of any ratable division.

The prayer for relief contains (*fol.* 30) a provision that the representatives of Lewisohn shall return to the complainant the *entire* consideration for the conveyance. This obviously cannot be performed in view of the receipt by Bigelow of a share of the consideration directly from the company.

SO THAT NEITHER CAN THE COMPLAINANT RETURN *in separatim* THE PROPERTY RECEIVED BY IT, NOR CAN IT REQUIRE EITHER BIGELOW OR LEWISOHN *separately* TO RETURN THE ENTIRE CONSIDERATION RECEIVED THEREFOR.

ON BOTH OF THESE GROUNDS THE RESCISSION IS IMPOSSIBLE.

Any rescission in the absence of either Bigelow or Lewisohn could be at the most but a partial rescission, which is not tolerated in equity.

Perley vs. *Balch*, 23 Pick., 286.
Sheffield Nickel Co. vs. *Unmen*, 2 Q. B. D., 223.
Shields vs. *Barrow, supra.*
Merrill vs. *Beckwith*, 163 Mass., 503.

FIFTH POINT.

The bill of complaint is multifarious, in that different reliefs inconsistent with each other are prayed for.

The bill (p. 26, Par. Twenty-sixth) states at length the desire of complainant for rescission and its offer of reconveyance of the property.

This necessarily involves an *election to rescind.*

Old Dom. Co. vs. *Lewisohn et al.*, 136 Fed Rep., 915.

The prayer of the bill is three-fold :

For a decree of rescission of the sale of the real estate made by Bigelow and Lewisohn to the complainant in payment for which the complainant issued and they received the 30,000 shares of the capital stock of the company (*fol.* 30, Paragraphs 1 and 2).

In the alternative, "*and in case complainant is not entitled to rescind said sale,*" for an assessment of the damages suffered by the complainant by reason of the sale, and judgment for said damages (*fol.* 30, Paragraph 3).

For such other relief as to the Court shall seem meet (*fol.* 30).

The first two, the prayer for rescission and the prayer for damages, are distinct and inconsistent.

The first proceeds on the theory *that the sale is void.*

The second proceeds on the theory *that the sale is valid.*

A bill in equity praying for such inconsistent reliefs is multifarious.

Daniels' Ch. Pl. & Pr., 385.

St. Louis, V. & T. H. R. Co. vs. *Terre Haute R. Co.*, 33 Fed. Rep., 440, 448.

Shields vs. *Barrow*, 17 How., 129, 143.

Wilkinson vs. *Dobbie*, 12 Blatch., 298, 301, 302.

Emans vs. *Emans*, 14 N. J. Eq., 114; cited with approval in *Walker* vs. *Powers*, 104 U. S.

WITH ELECTION DECLARED AND RESCISSION INSISTED UPON, THERE CAN BE NO RECOVERY FOR DAMAGES.

Williams vs. *Jackson*, 107 U. S., 478, 484.

Lloyd vs. *Brewster et al.*, 4 Paige, 537. *N. Y.*

Connihan vs. *Thompson*, 111 Mass., 270.

SIXTH POINT.

The petition should be denied.

Respectfully submitted,

EUGENE TREADWELL,
Counsel for Respondent.

SYNOPSIS OF BRIEF

PAGE

STATEMENT OF FACTS 1

SUMMARY 12

SPECIFICATION OF ERRORS 14

ARGUMENT 15

FIRST. The sale was made by promoters to a corporation organized for the purpose and exclusively controlled and represented by them 15

SECOND. A sale by a promoter to his corporation where the latter is not independently represented is voidable at its option unless the sale is made valid by acquiescence of all concerned 17

I. The rule is of universal application that wherever a vendor stands in a fiduciary relation to his vendee, the sale is voidable, unless independently acquiesced in by the latter with full knowledge of all material facts 17

II. A promoter stands in a fiduciary relation to the corporation he promotes, and is subject to this rule . 18

III. The liability of the promoter exists independently of any misrepresentation, of the issue of a prospectus, or of the particular method in which the transaction is carried out 21

THIRD. Such acquiescence must include all persons who are or become interested in the enterprise as associates of the promoters 28

I. The duty of the promoters extends to all persons whom they bring in as original subscribers for stock whether before or after the transaction complained of 28

II. It is not enough that all persons who have formally joined the corporation at the time of the transaction assent if others are in fact interested and join as part of the original plan 32

FOURTH. In the case at bar there were persons interested who did not knowingly acquiesce in the sale 37

I. There were stockholders in the corporation on September 18, 1895, when the transaction was completed, who did not acquiesce 37

PAGE

II. The subscribers for the twenty thousand shares issued for cash were persons interested who did not acquiesce 39

III. The members of the Old Dominion Syndicate were persons interested who did not acquiesce 44

IV. There was clearly no disclosure and therefore no acquiescence if persons other than the promoters themselves were concerned 49

FIFTH. The case at bar is entirely different from those cases in which the promoters take all the stock and subsequently sell part to other persons 52

SIXTH. The appellees have failed to distinguish the case at bar from those cases in which, because a fiduciary relation existed as to persons who did not acquiesce, the transaction was voidable 60

SEVENTH. The plaintiff corporation is entitled to a rescission of the sale and a return of the consideration, or in the alternative to an account of profits made by the sale 63

I. The right to relief is in the corporation and not in the individual stockholders 63

II. Rescission is the appropriate relief 64

III. The lapse of time is no bar to a rescission 65

IV. In the alternative, if for any reason the Court deems it improper to grant relief by rescission the plaintiff is entitled to recover profits 67

EIGHTH. Albert S. Bigelow is not a necessary party to this suit . 72

I. If the relief sought can be granted without joining persons not within the jurisdiction, such persons need not be joined 72

II. The relief sought can be granted without affecting any rights of Bigelow, and without injury to the defendants 74

1. Wherever relief is granted on a liability that is several, it is unnecessary to join persons who may also be jointly liable with the defendant 74

2. There is nothing peculiar to relief by rescission that prevents the application of this principle . 76

NINTH. The bill is not multifarious 83

I. The bill does not join different and inconsistent cases 83

II. The bill does not ask for different reliefs inconsistent with each other 83

Supreme Court of the United States

OCTOBER TERM, 1907

NO. 206

THE OLD DOMINION COPPER MINING AND SMELTING COMPANY, APPELLANT

v.

FREDERICK LEWISOHN AND OTHERS, APPELLEES

BRIEF FOR APPELLANT

STATEMENT OF FACTS

This case is an appeal by writ of certiorari issued to review a decision of the Circuit Court of Appeals for the Second Circuit.

On January 6, 1903, the appellant filed a bill in equity, in the United States Circuit Court for the Southern District of New York, against the appellees as executors of the will of Leonard Lewisohn, late of New York, seeking to rescind a sale to it of certain mining claims and in the alternative for other relief. The respondents in that suit demurred to so much of the bill as sought rescission for want of equity and want of parties and to all the bill for multifariousness.

The bill was founded upon certain transactions by which Leonard Lewisohn and one Albert S. Bigelow of Cohasset, Massachusetts, organized the plaintiff corporation and sold to it certain mining claims in Arizona. Shortly before

this bill was filed a bill identical in terms, except so far as the different positions of the individuals who were defendants made differences necessary, was filed in the Supreme Judicial Court of Massachusetts against Bigelow, to rescind the same sale and in the alternative for other relief. In the latter suit Bigelow filed demurrers identical with those filed in this suit. Bigelow could not be joined in the suit in New York for lack of jurisdiction over his person, and the executors of Lewisohn could not be joined in the Massachusetts suit for lack of jurisdiction there over them. Both bills alleged that the transaction complained of was pursuant to a joint plan and conspiracy by Bigelow and Lewisohn, carried out for their joint benefit. Both suits were necessary unless the plaintiff was to elect to pursue one only of the alleged wrongdoers.

The Massachusetts suit was heard upon demurrer by the Supreme Judicial Court of Massachusetts in December, 1904. The suit in New York was heard upon demurrer on February 20, 1905, and on February 24 the demurrer was sustained (136 F. R. 915). The Circuit Court treated the so-called demurrer to part of the bill as a general demurrer for want of equity and held that the bill stated no cause of action. The bill was then amended so as to make certain allegations more specific, and to the amended bill demurrers identical with those to the original bill were filed, except that the demurrer to the whole bill was also for want of equity.

On June 19, 1905, the Supreme Judicial Court of Massachusetts rendered a decision in the Massachusetts suit against Bigelow, overruling the demurrers. The Court considered carefully the decision of the Circuit Court in the present suit, which had been called to its attention, but declined to follow that decision and held that the bill stated a good cause of action (188 Mass. 315).

The amended bill in the Circuit Court in New York was heard on demurrer in November, 1905. The Court held that the amended bill was in substance the same as the

original bill, and that the orderly course of practice therefore required that the former decision of the Circuit Court be followed and the demurrers sustained. (Record, p. 23.)

From the decision of the Circuit Court an appeal was duly taken to the Circuit Court of Appeals. Upon hearing that Court sustained the demurrers and affirmed the decision of the Circuit Court, briefly dismissing the decision in the Massachusetts suit on the ground of supposed inconsistency with certain decisions of the Circuit Court of Appeals and of the New York Court of Appeals. (Record, p. 31.)

On February 27, 1907, this Court upon the petition of the appellant granted a writ of certiorari to review the decision of the Circuit Court of Appeals.

In November, 1907, the suit in Massachusetts was heard before a single justice of the Supreme Judicial Court, who found all the facts in favor of the plaintiff and entered a decree for the recovery of about two million dollars, including interest.

The material facts set forth in the amended bill of complaint (Record, p. 2) and admitted by the demurrer are as follows:

On and prior to April 30, 1895, there existed a corporation called the Old Dominion Copper Company of Baltimore City, which for convenience is hereinafter called the Baltimore Old Dominion Company. This corporation then owned a copper mine and mining claims in Arizona. It had a capital stock of five hundred thousand dollars par value, divided into twenty-five thousand shares of the par value of twenty dollars each. Of these shares seventeen thousand eight hundred and fifty-seven were then owned by the executors of the will of Michael H. Simpson, late of Boston, and the remainder were owned by William Keyser, of Baltimore. Mr. Keyser also held the legal title to certain mining claims and real estate.

Prior to May 4, 1895, Leonard Lewisohn and Bigelow formed the plan of acquiring all the capital stock of the Baltimore Old Dominion Company and of organizing a

new company and selling to such new company all the mining property of the Baltimore Old Dominion Company at a price which should give them a large profit above the cost to them of the stock of the Baltimore Old Dominion Company, and at the same time of providing the new corporation with working capital and money to use for other purposes by offering to the public for subscription and issuing to subscribers as a part of the same transaction shares of stock in such new corporation. The purpose of the plan was, in short, to buy up the property, or control of the property, in order to sell it at an advance to the new company to be formed by them, taking for themselves the profit of such resale, and at the same time to induce the public to take shares in the new company so as to furnish it with money.

Lewisohn and Bigelow in order to carry out this plan obtained an option at some time prior to May 24, 1895, to purchase from the executors of the will of Michael H. Simpson seventeen thousand eight hundred and fifty-seven shares for seven hundred and fourteen thousand two hundred and eighty-five dollars. For the purpose of providing themselves with the money to buy these shares and carry out their plan, they associated a number of persons with themselves under the name of the Old Dominion Syndicate. The members of the syndicate subscribed to a fund amounting eventually in the aggregate to one million dollars, and undertook to pay in on May 27, 1895, fourteen per cent of their respective subscriptions, and the balance in three equal instalments on July 26, August 25, and September 24 then following, with interest on each deferred instalment at five per cent. The syndicate agreement was in effect that the amount subscribed and paid in should be used for the purpose of acquiring the property or capital stock of the Baltimore Old Dominion Company, and that the subscribers should receive the profit made upon the resale of the property to a new corporation in proportion to the amount of their respective subscriptions (Bill, par. Fourth). The first instalment under the syndi-

cate agreement was paid in on May 27, 1895, and was used in making the first payment under the option. (Par. Fifth.)

About June 13, 1895, Lewisohn and Bigelow, for the purpose of further carrying out their plan, obtained from Keyser an option to purchase the remaining seven thousand one hundred and forty-three shares of stock in the Baltimore Old Dominion Company for two hundred and eighty-five thousand seven hundred and fifteen dollars, and on June 20, 1895, paid the first instalment of the price, using the funds of the syndicate for the purpose. (Par. Sixth.) On the same day Keyser, pursuant to an agreement between him and Lewisohn and Bigelow, and with the consent of the executors of the will of Simpson, conveyed to Lewisohn, without any further payment or consideration, the mining claims and real estate above referred to, and caused Bigelow and Lewisohn to be elected directors and president and treasurer respectively of the Baltimore Old Dominion Company. (Pars. Seventh, Eighth.)

On July 8, 1895, Lewisohn and Bigelow, in order to carry out their plan, procured the incorporation of the plaintiff company under the laws of the State of New Jersey. Seven incorporators, selected and employed by them for the purpose, only one of whom, and he a son of Leonard Lewisohn, had any actual interest, formed the corporation and subscribed for forty shares of stock, all of which were paid for by Lewisohn and Bigelow. The first meeting of the corporation was held on July 9, 1895; by-laws were adopted, the seven incorporators were chosen directors, the capital stock was increased to three million seven hundred and fifty thousand dollars, divided into one hundred and fifty thousand shares of twenty-five dollars each, and officers were chosen from among the seven incorporators. (Pars. Ninth, Tenth.)

On July 11, 1895, a meeting of the directors of the corporation thus formed was held in New York City. Pursuant to instructions from Lewisohn and Bigelow five

of the seven directors successively resigned, and there were chosen successively in their places Bigelow, Leonard Lewisohn, Henry M. Whitney, Joseph G. Ray, and Thomas Nelson; and pursuant to the same instructions the president, vice-president, and treasurer resigned, and Bigelow was chosen president and Thomas Nelson treasurer. Leonard Lewisohn and Bigelow were present at this meeting, and took part in the proceedings after their respective elections as directors. (Par. Eleventh.)

After the above changes had been made, the board of directors of the plaintiff corporation, provided by Lewisohn and Bigelow, consisted of Leonard Lewisohn and Bigelow, Allen W. Evarts, who was the attorney employed by them to carry out their plan, Edward Buffum, a person selected and employed by them for the same purpose, and Henry M. Whitney, Thomas Nelson, and Joseph G. Ray, none of whom were present, and each of whom was a member of the Old Dominion Syndicate and interested in the plan to sell the property of the Baltimore Old Dominion Company to the plaintiff corporation at a price which should yield a large profit. All of these persons had been selected by Lewisohn and Bigelow, and chosen for the purpose of carrying out their plan. (Par. Twelfth.)

On July 11, 1895, the directors of the Baltimore Old Dominion Company, consisting of Bigelow, Lewisohn, and one R. Brent Keyser, who acted as their representative and according to their instructions, authorized all the property of the corporation, except the cash assets, to be offered to the plaintiff corporation for one hundred thousand shares of its stock. (Par. Thirteenth.)

On the same day, at the meeting of the directors of the plaintiff corporation above referred to, and after the changes in the board of directors and in the officers above specified had been made, Bigelow presented to the board of directors so constituted an offer of the Baltimore Old Dominion Company to sell substantially all its property, except cash assets, to the plaintiff for one hundred thou-

sand shares of the capital stock of the par value of twenty-five dollars each, the stock to be issued to the vendor company or its nominee. This offer was in writing, signed by Bigelow as president and by Allen W. Evarts as secretary of the Baltimore Old Dominion Company. Leonard Lewisohn thereupon moved that the offer be accepted, Evarts seconded the motion, and Bigelow and Lewisohn caused it to be unanimously so voted. (Par. Thirteenth.)

Immediately after the above vote was passed Leonard Lewisohn made a proposition to the board of directors of the plaintiff corporation to sell and convey to the plaintiff the mining claims and real estate conveyed by Keyser to him, in return for thirty thousand shares of the plaintiff's capital stock, and accompanied his proposition with a request that the stock be issued to Bigelow and himself. Bigelow and Lewisohn caused the directors unanimously to vote to accept this proposition, and it was so accepted. (Par. Fourteenth.)

Pursuant to their original plan, Lewisohn and Bigelow, about July 18, 1895, in order to furnish the plaintiff with money for working capital, and for other purposes, caused the twenty thousand shares of the plaintiff's stock remaining undisposed of to be offered by the corporation to the public for subscription at its par value. All this stock was so subscribed and taken. The subscribers were entirely ignorant of the profit made by Lewisohn and Bigelow from the sale of the mining claims and real estate to the plaintiff. (Par. Fifteenth.)

On or before July 8, full payment was made to the executors of the will of Michael H. Simpson and to William Keyser for all the stock of the Baltimore Old Dominion Company. These payments, amounting in the aggregate to one million dollars, were from the funds contributed to the Old Dominion Syndicate or in part from such funds and in part from money provided by Lewisohn which was afterwards repaid to him from the funds of the syndicate. (Par. Sixteenth.)

Possession of the property of the Baltimore Old Do-

minion Company sold to the plaintiff was given on July 12, 1895, and subsequently that property and the real estate and mining claims originally standing in the name of Keyser and conveyed by him to Lewisohn were duly conveyed to the plaintiff. On September 18, 1895, Lewisohn and Bigelow caused all the stock of the plaintiff corporation to be issued — one hundred thousand shares to the nominee of the Baltimore Old Dominion Company for the property of that company, thirty thousand shares to themselves for the real estate and mining claims, and twenty thousand shares to the cash subscribers. (Par. Sixteenth.)

The property conveyed to the plaintiff by the Baltimore Old Dominion Company was at the time of conveyance fairly worth not more than one million dollars. The real estate and mining claims conveyed to the plaintiff by Lewisohn were fairly worth not more than five thousand dollars. Bigelow and Lewisohn acquired the stock of the Baltimore Old Dominion Company and the real estate and mining claims, knowing that the several properties were not then fairly worth more than the amounts above specified respectively, and with intent to sell the properties for much more than the cost. They made no disclosure to the plaintiff corporation or to any of the persons who subscribed for stock or joined the Old Dominion Syndicate as to the value, and because of their control over the plaintiff corporation no inquiry was made by it or in its behalf. (Par. Seventeenth.)

By the foregoing transactions Bigelow and Lewisohn acquired for one million dollars all the stock of the Baltimore Old Dominion Company, and acquired without the payment of any additional consideration the real estate and mining claims. They organized the plaintiff corporation sold to it, and controlling it absolutely caused it to buy the property of the Baltimore Old Dominion Company for one hundred thousand shares of stock having a par value of two and a half million dollars, sold to it the real estate and mining claims for thirty thousand shares having a par value of seven hundred and fifty thousand dollars, and had

the plaintiff issue to the public for cash twenty thousand shares having a par value of five hundred thousand dollars. (Par. Eighteenth.)

Bigelow and Lewisohn divided eighty thousand shares out of the one hundred thousand among the members of the syndicate, retaining the other twenty thousand ostensibly for their expenses, which in fact did not exceed six thousand dollars. They divided between themselves the thirty thousand shares received for the real estate and mining claims. (Par. Nineteenth.)

All of the foregoing transactions were pursuant to a preconceived scheme on the part of Bigelow and Lewisohn. Before they acquired the stock of the Baltimore Old Dominion Company they had formed a plan to organize a corporation to take over the property at a large advance on the cost, and at the same time issue stock to the public for working capital. They formed the syndicate in order to provide money with which to acquire the stock and through the stock the property. In order to carry out their original plan they organized the plaintiff corporation, put themselves in absolute control, and caused it to buy from the Baltimore Old Dominion Company, also controlled by them, and from Lewisohn individually, the properties in question; and as a part of the same plan and of the same transaction they had shares of the plaintiff's stock offered to the public for subscription and issued to the subscribers in order to furnish a working capital. (Par. Twenty-first.)

Bigelow remained president and chief executive of the plaintiff corporation continuously from its organization until April 4, 1902. Throughout that period the board of directors was made up of persons selected by Bigelow and Lewisohn, a large majority of whom were personal friends of theirs and had been interested in the transactions set forth. No disclosure was ever made as to these transactions, and until after April 4, 1902, when a change of management took place, the plaintiff had no knowledge

of the facts or that Bigelow and Lewisohn had taken a profit. (Par. Twenty-second.)

The real estate and mining claims have since the conveyance to the plaintiff remained undeveloped, and are now in substantially the same condition as at the time of the conveyance. (Par. Twenty-third.)

Lewisohn died March 5, 1902, a resident of New York, and the defendants are the executors of his will there proved and are all citizens of New York. (Par. Twenty-fourth.)

On September 12, 1902, as a result of investigations, the plaintiff asserted a right to rescind the sale and conveyance to it of the real estate and mining claims and offered to make such rescission. The defendants denied any right to rescission or recovery. (Par. Twenty-fifth.)

The plaintiff desires to make such rescission, and by its bill offers to convey the real estate and mining claims to such person or persons as the Court may direct. Bigelow is a citizen of Massachusetts and not within the jurisdiction of the Court. The plaintiff does not in this suit seek any relief as to the sale to it of the property of the Baltimore Old Dominion Company, as to which a separate suit is pending. (Par. Twenty-sixth.)

The prayer of the bill is (Record, p. 17):

1. For a rescission of the sale and conveyance.
2. A return of the thirty thousand shares given as consideration.
3. In the alternative, in case the Court refuses to grant rescission, an ascertainment by the Court and recovery of damages suffered by the plaintiff.
4. For general relief.

To this bill of complaint the defendant filed two demurrers:

First. To the whole bill for want of equity and for multifariousness in joining distinct and inconsistent causes of action and prayers of relief. (Record, p. 21.)

Second. To so much of the bill as seeks rescission for want of equity and for absence of Bigelow as a party. (Record, p. 22.)

The Circuit Court sustained the demurrer to the original bill for want of equity and overruled it as to multifariousness (136 Fed. R. 915). The demurrer to the amended bill for want of equity was sustained and the bill ordered dismissed (Record, p. 23). From this decision the plaintiff appealed. The Circuit Court of Appeals affirmed the decision of the Court below. (Record, p. 30.)

Summary

Shortly stated, the case set out in the bill is as follows:

Leonard Lewisohn and Bigelow formed a plan to acquire the mining property of the Baltimore Old Dominion Company, to resell it at a profit to a corporation to be formed by them for the purpose of purchasing, and to furnish the new corporation with working capital by having it issue part of its stock to the public.

In pursuance of this plan they acquired options on all the stock of the Baltimore Company, formed a syndicate to raise the one million dollars necessary to carry out the options, and did purchase with the money so raised all the stock. The members of the syndicate by the terms of the syndicate agreement were to share proportionately to their contributions in the profit (Rec. p. 4). William Keyser, owner of a part of the stock, who had given an option on his shares, upon completion of the purchase in addition to transferring his stock, conveyed to Lewisohn for the joint benefit of Lewisohn and Bigelow, certain mining claims now in question. The only consideration paid for this conveyance and transfer was the option price of the stock.

Lewisohn and Bigelow then organized the plaintiff corporation. The organization was effected by seven persons selected for the purpose who subscribed for forty shares, all of which were paid for by Lewisohn and Bigelow. On July 11, 1895, the authorized capital was increased to one hundred and fifty thousand shares of twenty-five dollars each. Bigelow was chosen president, and the board of directors was reorganized so as to consist of Bigelow, Lewisohn, their attorney Evarts, an employee Buffam, and three members of the syndicate selected by them. After the changes in the board of directors Bigelow, Lewisohn, Evarts, and Buffam, being the only directors present, voted to accept an offer made by Bigelow as president of the Baltimore Company to sell all its property,

except cash assets, for one hundred thousand shares of the plaintiff's capital stock and an offer of Lewisohn to sell the mining claims for thirty thousand shares.

One week later the directors offered the remaining twenty thousand shares (the forty shares already subscribed for being disregarded) to the public; those shares were all subscribed for at par. The property was conveyed, and on September 18, 1895, all the capital stock was issued: one hundred thousand shares to a nominee of the Baltimore Company, in payment for the mining property, of which shares the syndicate received eighty thousand and Bigelow and Lewisohn appropriated the remainder; thirty thousand shares to Bigelow and Lewisohn for the mining claims; twenty thousand shares to the subscribers.

All of the acts set forth were done by Bigelow and Lewisohn as part of their original plan and in order to carry it out. The issue of shares to the public for working capital and the issue for the property purchased constituted in fact parts of a single transaction. None of the other syndicate members and none of the cash subscribers knew of the property taken by Bigelow and Lewisohn on the sale to the corporation of the mining claims, and the facts remained undisclosed until in 1902 Bigelow and Lewisohn ceased to control the corporation.

The prayer of the bill is for a rescission of the sale of the mining claims and recovery of the consideration, or in the alternative for an accounting or for recovery of the damage suffered by the corporation.

The real question presented by the demurrer for want of equity is whether under the circumstances set forth in the bill Bigelow and Lewisohn were liable to the corporation as promoters for the secret profit made by them upon the sale of the mining claims. It has not been seriously denied that they were in every legal sense promoters of the plaintiff corporation. But the respondents have contended that the facts show no case of a promoter's liability, and the Circuit Court of Appeals so held, apparently on the ground that when the vote to accept the offer made the

corporation was passed the only persons interested were the promoters themselves, and that it was immaterial whether or not other persons were immediately to become members of the corporation at the promoters' invitation and as a part of their plan for completing the organization of the corporation, or became interested before the sale was completed and the stock transferred. This view it is believed is wholly at variance both on principle and authority with the law regulating the duties and liabilities of promoters.

SPECIFICATION OF ERRORS

First. The Court erred in holding that the bill was without equity.

Second. The Court erred in not holding that the sale complained of was voidable by the corporation.

Third. The Court erred in holding that the sale was made valid by acquiescence of all persons at the time constituting the corporation.

Fourth. The Court erred in not holding that the plaintiff was entitled to a rescission or in the alternative to an account of profits.

ARGUMENT

FIRST

THE SALE WAS MADE BY PROMOTERS TO A CORPORATION ORGANIZED FOR THE PURPOSE AND EXCLUSIVELY CONTROLLED AND REPRESENTED BY THEM.

Lewisohn made the sale now in question direct to the plaintiff corporation. He had acquired title to the mining claims for the benefit of himself and Bigelow (Bill, par. Eighth, Rec. p. 6); he offered to convey them to the corporation for thirty thousand shares of its stock; the offer was accepted, conveyance was thereafter made by him to the corporation, and the shares were issued as requested to him and Bigelow jointly.

Lewisohn and Bigelow stood in the relation of promoters to the plaintiff corporation. It is not necessary to consider precisely what constitutes a promoter, for according to any and all definitions the relation of promoter existed here. Lewisohn and Bigelow conceived the plan of organizing the Old Dominion Copper Mining and Smelting Company (Bill, par. Third, Rec. p. 3); they caused it to be organized and selected the original incorporators and paid for the original subscriptions of these incorporators to the capital stock (Bill, par. Ninth, Rec. p. 6); they selected the first board of directors, by whom the purchase was made, and the other officers (Bill, par. Eleventh, Rec. p. 7); they and they alone through their agents did all that brought the corporation into existence; they caused the stock not otherwise disposed of to be offered for public subscription (Bill, par. Fifteenth, Rec. p. 9); and all of these acts were done as part of a preconceived scheme, of which making the purchase of the mining claims was a part. (Bill, par. Twenty-first, Rec. p. 13.)

These facts are similar to those shown in *Dickerman* v. *Northern Trust Company*, 176 U. S. 181. In that case (p. 203) this Court fully approved the following definition of a promoter given by Mr. Cook:

> "A promoter is a person who brings about the incorporation and organization of a corporation. He brings together the persons who become interested in the enterprise, aids in procuring subscriptions and sets in motion the machinery which leads to the formation of the corporation itself." Cook on Stockholders, sec. 651.

The plaintiff corporation was organized by Bigelow and Lewisohn for the express purpose of purchasing the property in order to carry out the original plan. At the time the sale was made and for a long time after the corporation was in the absolute control of the promoters. They provided it with a board of directors consisting of themselves, their attorney, and their employees, and three other persons friendly to them who were absent when the transaction was carried out. The corporation was represented in the transaction by the four directors present, the two promoters and their two agents who acted, and were selected in order that they might act, according to instructions. (Bill, par. Twenty-first, Rec. p. 14.)

The sale to rescind which this suit is brought was thus made to the plaintiff corporation at a time when it had no independent existence or representation; the promoters who sold acted as the agents and representatives, and as the only agents and representatives, of the purchaser. It is in respect to the sale so made that relief is sought.

SECOND

A CORPORATION IS ENTITLED TO RELIEF AGAINST A SALE MADE TO IT BY PROMOTERS WHO THEMSELVES CONTROL THE CORPORATION UNLESS ALL PERSONS ENTITLED TO OBJECT ACQUIESCE.

I

The rule is universal that if a vendor stands in a fiduciary relation to his vendee the sale is voidable, unless independently acquiesced in by the latter with full knowledge of all material facts.

It is a general rule of universal application in equity that one who stands towards another in a fiduciary relation shall not deal with his beneficiary unless he puts the latter in every respect on an equality by seeing that he is independently represented and has all the relevant information as to the proposed transaction which the trustee has. If in any transaction a trustee, including in the term all persons occupying a fiduciary relation, has in effect dealt with himself, has acted in behalf of his beneficiary when the trustee himself had an adverse personal interest, or by the use of his position as trustee has made a profit, even though not made at the expense of the trust estate, the beneficiary may avoid the transaction and may recover the profit. It is immaterial that the beneficiary has not been cheated; the transaction may even have been advantageous for him; he can none the less avoid it.

Wardell v. *Railroad Co.*, 103 U. S. 651, 658.
Thomas v. *Peoria & R. I. R. Co.*, 36 F. R. 808.
Tyrrell v. *Bank of London*, 10 H. L. C. 26.
Aberdeen Railway Co. v. *Blaikie*, 1 McQueen, 461.

II

A promoter stands in a fiduciary relation to the corporation he promotes, and is subject to this rule.

The duty of a promoter to his corporation was described by this Court, though the case did not call for an application of the principle, in *Dickerman* v. *Northern Trust Company,* 176 U. S. 181. The Court there said:

> "He is treated as standing in a confidential relation to the proposed company, and is bound to the exercise of the utmost good faith. Lloyd, Corporate Liability, 18; *Densmore Oil Co.* v. *Densmore,* 64 Penn. St. 43; *Bosher* v. *Land Co.,* 89 Virginia, 455. The promoter is the agent of the corporation and subject to the disabilities of an ordinary agent. His acts are scrutinized carefully, and he is precluded from taking a secret advantage of the other stockholders." P. 204.

Occupying a fiduciary position, promoters are held to the same strict accountability in dealings with the corporation to which they owe their duty as other trustees. If they make a contract with the corporation, the contract may be invalidated unless it appears that the corporation acted independently and with full knowledge. If they take a secret profit in their dealings with the corporation, they may be required to return that profit, just as a director selling to his corporation may be compelled to return his profit, or the sale may be avoided.

In *Yeiser* v. *U. S. Board & Paper Co.,* 107 F. R. 340, certain individuals secured an option on a paper mill; they organized a corporation and sold the property to it at an advance of twenty-five thousand dollars, paying for a part of the stock that they subscribed for with the purchase money received from the corporation. The Circuit Court of Appeals held that the profit was illegal and that the corporation could recover the profit by annulling the

title of the promoters to the amount of stock paid for with the money representing the profit.

In *Hayward* v. *Leeson*, 176 Mass. 310, promoters secured options on land; they then organized a dummy corporation which took over the options and in turn sold them to the East Tennessee Land Company, taking stock in the latter in payment. The promoters by this sale realized and took to themselves a profit of seven hundred thousand dollars in stock of the East Tennessee Land Company. The latter corporation having failed, the Court held that its receiver could recover in suits brought against two of the promoters for the profits made by them.

In *Old Dominion Copper Mining & Smelting Co.* v. *Bigelow*, 188 Mass. 315, upon a bill against Bigelow, setting forth the same facts as the present bill, the Court held on demurrer that the defendant was liable. Mr. Justice Loring said:

> "It was settled by the recent case of *Hayward* v. *Leeson*, 176 Mass. 310, that a promoter of a corporation stands in a fiduciary relation to the corporation of which he is a promoter." 188 Mass. 320.

In *Central Trust Co.* v. *East Tennessee Land Co.*, 116 F. R. 743, the soundness of the decision in *Hayward* v. *Leeson* was called in question, and the decision was explicitly approved by the Circuit Court of Appeals.

In *Yale Gas Stove Co.* v. *Wilcox*, 64 Conn. 101, a promoter organized a corporation to acquire a patent. He caused the corporation to buy the patent at a price much higher than that at which the owner was in fact willing to sell and took a large profit to himself from the excess. The patent was a valuable one and the corporation did not desire to rescind the sale, but it sued to recover the profit and the suit was sustained.

In other cases recovery has been allowed under like circumstances:

Chandler v. *Bacon*, 30 F. R. 538.
Burbank v. *Dennis*, 101 Cal. 90.

The Telegraph v. *Loetscher*, 127 Iowa, 383.
Hinckley v. *Sac Oil & Pipe Line Co.*, 132 Iowa, 396.
Camden Land Co. v. *Lewis*, 101 Me. 78.
Fred Macey Co. v. *Macey*, 143 Mich. 138.
South Joplin Land Co. v. *Case*, 104 Mo. 572.
Exter v. *Sawyer*, 146 Mo. 302.
Woodbury Heights Land Co. v. *Loudenslager*, 55 N. J. Eq. 78; 56 N. J. Eq. 411; 58 N. J. Eq. 556.
First Avenue Land Co. v. *Hildebrand*, 103 Wis. 530.
Hebgen v. *Koeffler*, 97 Wis. 313.
Hitchcock v. *Hustace*, 14 Hawaii, 232.

In England the rule is equally well established.

In *Erlanger* v. *New Sombrero Phosphate Co.*, 3 App. Cas. 1218, a syndicate formed by Erlanger purchased the lease of a phosphate island, formed a corporation to take over the lease, caused the directors selected by the syndicate to vote to purchase the lease at a large profit from a dummy who held it for the syndicate and at the same time to issue shares to subscribers. The company was not prosperous, and the profit made by the syndicate becoming known, suit was brought to rescind. It was held that the promoters had violated their duty in selling to the corporation without furnishing it an independent body of directors and making a full disclosure, and that the sale could be rescinded.

In *Gluckstein* v. *Barnes* (1900), A. C. 240, promoters purchased the property of a corporation that was in liquidation. They organized a corporation to take over their purchase at a considerable profit, which was fully disclosed. Before completing the transaction they secured for themselves a large additional profit by buying up at a discount securities of the liquidating corporation receivable in payment of the price they were to pay the liquidator. This profit was not disclosed. The House of Lords held that the promoters, by reason of their fiduciary position, were liable to the corporation they had organized for the amount of this profit.

III

The liability of the promoter exists independently of any misrepresentation, of the issue of a prospectus, or of the particular method in which the transaction is carried out.

The liability of a promoter arises from the fiduciary position which he occupies. Relief is granted for breach of the duty imposed by that position. The duty of one acting in a fiduciary capacity is to engage in no transaction in which his interest and that of his beneficiary may conflict without putting the beneficiary in a position to act independently and with knowledge of all material facts known to the trustee. If the trustee would deal with the beneficiary or in a matter in which the interests of the beneficiary may be affected, and himself has an adverse interest, he acts at his peril unless he first sees to it that his beneficiary is independently represented and has the benefit of a full disclosure.

The foundation of the liability is not the necessity of redressing actual fraud, but of preventing the possibility of wrongdoing. This Court said in *Marsh* v. *Whitmore*, 21 Wall. 178, 183, 184:

> "The character of vendor and that of purchaser cannot be held by the same person. They impose different obligations. Their union in the same person would at once raise a conflict between interest and duty, and, constituted as humanity is, in the majority of cases duty would be overborne in the struggle. The law, therefore, wisely prohibits a party selling on another's account from becoming a buyer on his own at the sale, and will always condemn transactions of that character whenever their enforcement is attempted."

Relief will be granted, even though the transaction was perfectly fair, if there was not independent representation.

Gilman C. & S. R. R. Co. v. *Kelly*, 77 Ill. 426, 435.
Dutton v. *Willner*, 52 N. Y. 312.

It is perfectly immaterial, as far as the existence of the promoter's liability is concerned, whether there is actual misrepresentation or not. Misrepresentation is merely an aggravation of the offence; there is a breach of duty as much in case of non-disclosure as in case of misstatement. This rule applies as much to a promoter as to any other person in a fiduciary position. To convict the promoter of a breach of duty justifying relief, it is no more necessary to show misrepresentation than in a proceeding for relief against an express trustee or an agent.

In the Erlanger case Lord Justice James in the Court of Appeals said:

"A promoter is, according to my view of the case, in a fiduciary relation to the company which he promotes or causes to come into existence. If that promoter has a property which he desires to sell to the company, it is quite open to him to do so; but upon him, as upon any other person in a fiduciary position, it is incumbent to make full and fair disclosure of his interest and position with respect to that property. I can see no difference in this respect between a promoter and a trustee, steward or agent." 5 Ch. D. 118.

In *Gluckstein* v. *Barnes*, (1900) A. C. 240, Lord Robertson said:

"To my thinking, the central fact in the history is, that while the object of the syndicate was to make a profit out of the resale of Olympia, it was an essential part of the enterprise, as originally designed and as actually carried out, that the same individuals who sold as syndicate should buy as directors." P. 256.

The liability does not rest upon deception or upon the sale being at too high a price. Mr. Justice Loring of the Supreme Judicial Court of Massachusetts, in dealing with the same facts now before the Court in the bill brought against Bigelow, speaking of the rights and liabilities of the promoters as to the property sold, said:

"Being the absolute owners of it, the defendant and Lewisohn could do with that property as they pleased, — let it lie idle, work it, or sell it, as they thought best, and if they determined to sell

it they could sell it to any one they might choose. If they chose to sell it to a stranger they could make the sale at arm's length, they could ask any price they pleased, and were under no legal obligation to state what it had cost them. On the other hand, if they elected to make a sale of it to one standing to them in a fiduciary relation, they were under an obligation to make a full disclosure to the beneficiary of all the facts known to them material to the property and the purchase, or see to it that the fiduciary had adequate independent advice. That is an obligation resting upon every fiduciary who makes a sale of his own property to his beneficiary, no matter whether it is a case of trustee and *cestui que trust*, guardian and ward, solicitor and client, or promoter of a corporation and the corporation itself." 188 Mass. 322.

As the foundation of the liability is the duty imposed by the fiduciary relation, it is clear that misrepresentation cannot be an essential part of the cause of action, and equally clear that the issue of a prospectus is immaterial. A prospectus is merely a public invitation or representation. If the prospectus is false, the effect is the same as if the persons responsible for its publication had made the same statements privately to each individual who has acted on the faith of the prospectus. A false prospectus issued by promoters may furnish convenient evidence of their breach of duty, if accompanied by evidence that no disclosure of facts was made except by the prospectus. But the mere issue of a false prospectus is not in itself proof of a breach of fiduciary duty or an essential part of such proof.

Misrepresentation, whether by means of a prospectus or otherwise, gives an individual cause of action at law to the person who has acted upon it to his detriment; breach of the fiduciary duty owing by a promoter to the corporation he represents gives no individual right of action to any single member of the corporation, but entitles the corporation, as representing its members collectively, to relief.

In *Erlanger* v. *New Sombrero Phosphate Co.*, 3 App. Cas. 1218, the form and candor of the prospectus were

discussed as bearing on the completeness of the disclosure made; but the issue of the prospectus was not the ground of recovery. All the judges in all the courts were unanimous in holding that the corporation was entitled to relief for failure of the promoters to disclose the profit they were making in selling property to the corporation, not for misrepresentation. Lord Blackburn carefully pointed out that this result was not based upon any misrepresentation or the issue of a prospectus, as to the effect of which he said:

"If individuals were deceived by misrepresentations a case might exist entitling such individuals to be personally relieved against the consequences of such misrepresentations, but the company would not have any title to be relieved on account of such misrepresentations to individuals, especially if the misrepresentations were made by those who at the time represented the company." P. 1264.

And later in his opinion he said:

"A great deal was said about the prospectus based on these letters being fraudulent. If this had been made out it would not have formed a substantive ground for relief to the company, but it would, I think, have been very material evidence that the board of directors who adopted and issued the fraudulent prospectus were under the undue influence of those who framed it." P. 1274.

In *Hayward* v. *Leeson*, 176 Mass. 310, there was a prospectus issued containing false statements, and in the case of *Old Dominion Copper Mining & Smelting Co.* v. *Bigelow*, 188 Mass. 315, counsel for the defendant sought to distinguish the earlier case on that ground. The Court by Mr. Justice Loring, who wrote the opinion of the Court in both cases, repudiated such a distinction, and explained that the prospectus had nothing to do with the cause of action, saying:

"The defendant has sought in the first place to distinguish the case at bar from *Hayward* v. *Leeson*, 176 Mass. 310, on the ground that in the prospectus in that case there was the false statement that the capital stock represented actual value, without inflation,

while a substantial part of it had been issued to the defendants and their associates for nominal services. But that fact was not spoken of in the opinion as the ground of the decision. The opinion went on the broad ground mentioned above. This false representation was spoken of in connection with a contention on the part of those defendants that they were not liable because of a finding made by the Superior Court that the defendants did not conceal the transaction from the knowledge of future stockholders." 188 Mass. 322.

Counsel for the appellees in the Circuit Court of Appeals laid it down as the rule that a promoter's liability could exist only in the following cases:

> "(1) such promoter must have purchased the property with the funds of the company;
>
> (2) or having previously purchased the property with his own funds reimburse himself from the funds of the company; or,
>
> (3) by the issuance of a prospectus containing inducements, false representations or concealments which tends to create a false impression and which amounts to misrepresentation."

Such a classification is purely empiric. Even if comprehensive it would be of no value because based merely on the presence of certain facts irrespective of the effect given those facts. No authority cited for the appellees sustained the proposition that one of the sets of facts enumerated was essential to create a promoter's liability. That actual misrepresentation or the issue of a prospectus is not essential has been shown both on principle and on the American and English authorities. The other two possible grounds of liability refer only to the precise method by which the secret profit is secured. By the first formula it is apparently meant that property resold by a promoter must have originally been purchased by him with the funds of the corporation in order to entitle the corporation to relief. Such a statement is contrary to all authority. No such state of facts existed in *Erlanger* v. *New Sombrero Phosphate Co.*, 3 App. Cas. 1218, or in

Gluckstein v. *Barnes*, (1900) A. C. 240, or in any of the leading cases. Reimbursement from the funds of the corporation appears to mean nothing more than a sale to the corporation. If by using the word " funds " it is intended to limit the transaction to a cash sale the authorities are otherwise. In both the English cases last referred to the profit of the promoters was made in part from stock received upon a sale to the corporation; so in the two Massachusetts cases and in *Yeiser* v. *U. S. Board & Paper Co.*, 107 F. R. 340, the sale was partly or wholly for stock. To assert that the application of the principle giving relief for breach of a fiduciary duty is dependent on the form in which the unfaithful trustee receives his booty is to abandon discussion of the question from a juridical standpoint.

None of the many authorities referred to by the appellees as upholding their contention either in the form above quoted or as to the necessity of misrepresentation by prospectus or otherwise, support the proposition.

In *Salomon* v. *Salomon*, (1897) A. C. 22, " the one man company case," the sole owner of a business incorporated it, issuing all the stock to himself except shares issued to his nominees to qualify them as directors. There was no liability because no person except himself was interested in the transaction. The distinction between such a case and the Erlanger case or *Hayward* v. *Leeson* is not the presence or absence of a prospectus, but absence of any violation of fiduciary duty because of the acquiescence of all to whom any duty could be due.

In *Tompkins* v. *Sperry*, 96 Md. 560, the promoters purchased all the property transferred to the corporation and transferred it in exchange for all the stock. Some part of the stock so received was afterwards sold by the promoters to others, but in such sales only the individual rights of the respective purchasers were involved. The Court distinguished the case from *Gluckstein* v. *Barnes* and *Erlanger* v. *New Sombrero Phosphate Co.*, on the ground that in those cases there was a secret profit taken:

"The promoters had a secret profit in the land which the corporation was formed to take over, and they issued a prospectus which did not disclose that fact, and thereby induced other persons to subscribe to the stock." P. 581.

The real distinction between such a case as *Tompkins* v. *Sperry* and the cases from which the Court distinguished it lies not in the absence of a prospectus, as to the presence or absence of which the report of *Tompkins* v. *Sperry* is silent, but in the presence or absence of persons having an interest in the corporation who do not knowingly acquiesce in the transaction; and it is this distinction on which the Court in *Tompkins* v. *Sperry* relied.

The fact that the right of action for a breach of fiduciary duty rests in the corporation illustrates the same principle. For deceit caused by the issue of a false prospectus each individual who is deceived has, as pointed out by Lord Blackburn, his remedy against the persons responsible. It is immaterial whether the plaintiff in such a case is an original subscriber or a purchaser of stock, if his act is the natural and intended result of issuing the prospectus.

On the other hand, for a breach of the fiduciary duty of a director or promoter the corporation only is entitled to maintain an action. The fiduciary duty of promoters and directors to their corporation is of course in the last analysis a duty to the individuals who collectively form the corporation. But it is the corporation with whom the obnoxious transaction is made. The ground of complaint is not that the promoters have by false representations induced the individuals to go into an enterprise, but that they have caused the corporation to make a contract, giving the promoters a secret profit, in which those individuals have not acquiesced.

THIRD

SUCH ACQUIESCENCE MUST INCLUDE ALL PERSONS WHO ARE OR BECOME INTERESTED IN THE ENTERPRISE AS ASSOCIATES OF THE PROMOTERS.

I

The duty of the promoters extends to all persons whom they bring in as original subscribers for stock, whether before or after the transaction complained of.

Any transaction between a trustee and his *cestui que trust* may be validated if the latter with full knowledge acquiesces in or ratifies the transaction. A director may sell to his corporation if the latter is at the time independently represented and receives a full disclosure of all relevant facts, or if subsequently the corporate body having such knowledge approves the sale. The protection of the fiduciary relation does not require that a beneficiary who is *sui juris* and put in a position of equality as to information should be disabled from dealing with his trustee.

The same principle applies in the case of a promoter. His duty to the corporation prevents him from dealing with it unless he has entitled himself to do so by fully disclosing all material facts and by giving the corporation an independent representative; if the promoter has failed to do this the transaction may yet be made valid by the ratification or approval of all persons who were interested. But in order that there may be such ratification or validation the transaction must be acquiesced in or approved by all the persons who constitute the corporate body entitled to object. The fact that individual members have approved or acquiesced cannot affect the rights of the corporation, which are the collective rights of all of its members. An innocent shareholder cannot be bound by the

approval of a majority, any more than an *ultra vires* act can be ratified except by unanimous approval.

1 Morawetz on Private Corporations, 2d ed., sec. 294.

Acquiescence makes valid a transaction otherwise voidable because it is the approval or ratification of those persons comprising the corporate body to which the fiduciary duty was owed. The persons who must acquiesce are those to whom there is such a duty; the persons who suffer from a breach of the duty.

The fiduciary relation of a promoter extends to all persons who join in starting the enterprise which he sets on foot. Persons who subscribe for stock of the corporation, at least where such stock is to be issued to subscribers as part of the plan for launching the enterprise, are clearly within this category. Where a promoter having created the skeleton of a corporation causes it to make a contract with him, that contract becomes binding upon the body of subscribers when by the issue of shares to them they become stockholders. If without disclosure to such subscribers the promoter has caused the skeleton corporation to make a contract giving to him a profit, each subscriber is injured by the lack of good faith. Each subscriber as to his interest in the corporation becomes bound by that contract. These subscribers are the persons who in their collective capacity become bound by the contract as soon as they become shareholders; if their becoming shareholders is a part of the promoter's original plan, then in making the contract he knowingly and intentionally imposes the contract on them at a time when in doing so he is in control of and representing the inchoate corporation to which they by their subscriptions for stock are to give vitality.

1 Morawetz on Private Corporations, 2d ed., sec. 292.

The courts fully recognize the nature and extent in this respect of a promoter's duty. It is correctly and conveniently described as a fiduciary duty to the corpora-

tion, because the corporation represents the collective rights of its members; but the duty is universally held to include all those persons who join in the enterprise by becoming original stockholders.

In *Dickerman* v. *Northern Trust Company*, 176 U. S. 181, this Court said of a promoter:

"He is precluded from taking a secret advantage of the other stockholders."

In *Yeiser* v. *U. S. Board & Paper Company*, 107 F. R. 340, 348, the Court said:

"In this country the courts have accepted the essential principle laid down in the English cases, and hold, with scarcely any variation to the doctrine, that the promoter of a company stands in the relation of a trustee to it and those who become subscribers to its stock, so long as he retains the power of control over it."

In *Chandler* v. *Bacon*, 30 F. R. 538, 540, Judge Colt stated as the basis of recovery from promoters who on a sale to the company by a third person had by agreement received a number of shares:

"The law forbids them, from their position, to secretly derive any benefit over other stockholders, and makes them accountable to the company for any profit so derived."

In *Hayward* v. *Leeson*, 176 Mass. 310, 320, the Court said:

"The persons to whom the promoters owe the duty which they owe by reason of their fiduciary relation are the persons who put their money into the enterprise at the invitation of the promoters, that is to say, the future stockholders."

In *South Joplin Land Co.* v. *Case*, 104 Mo. 572, 579, the Court said:

"And persons who subscribe for stock have a right to do so upon the assumption that the promoters are using their knowledge, skill and ability for the benefit of the company."

In *Erlanger* v. *New Sombrero Phosphate Co.*, 3 A. C. 1218, the company was formed and registered and the

contract of sale by the vendors to it entered into before the subscriptions for shares were solicited or obtained. None of the judges before whom the case came doubted that the fiduciary duty existed and was violated by failure to disclose the facts to the subscribers.

In *Gluckstein* v. *Barnes*, (1900) A. C. 240, 257, Lord Robertson, referring to the promoters, said:

"The people for whom these gentlemen were bound to act were their coming constituents, the persons out of whose money they proposed to make their gain."

In *Re Leeds & Hanley Theatres*, (1902) 2 Ch. 809, Lord Justice Williams, speaking of a promoter, said:

"I do not mean that the Finance Company stood in a fiduciary relation to these directors and these seven signatories to the memorandum of association, but to the future allottees of shares in the Theatre Company."

And again:

"I do not think it matters whether they made a disclosure to the directors who were their nominees or whether they did not, for as I have already pointed out, among their *cestuis que trust* were the future allottees of shares."

It was pointed out in like manner, in the earlier case of *Re British Seamless Paper Box Co.*, L. R. 17 Ch. D. 467, that the persons who actually furnished the bone and sinew of the corporation, although they might not become members until after the transaction complained of, were the persons to whom the promoters owed their duty. Sir George Jessel said:

"You can defraud future allottees as well as present allottees." P. 472.

And Lord Justice Cotton said the principle was:

"that the directors stand in a fiduciary position to the whole company, that is, not only to the existing members, but to all whom they intend to bring in." P. 479.

Any device by which a promoter gains an advantage over those who associate themselves with him in his enterprise is a violation of duty, and unless such person with full knowledge acquiesces the transaction is voidable. The decisive point is not whether the person becomes a member of the corporation at one time or another, before or after the transaction complained of. The test is whether he joins under such conditions and at such a time that the promoter is in reality acting for him, and this depends on whether he is one of the persons whose co-operation is expected and required as a part of the promoter's plan. One who joins the corporation as an original subscriber satisfies this test. It is these subscribers who in effect give reality to the transaction; it is they from whose money the promoter expects to make his profit; until they join the corporation and make up an actual corporate body, the enterprise is incomplete. Every such subscriber is entitled to rely upon the fiduciary relation with the promoter, and the assent of every such subscriber is necessary to validate a transaction otherwise voidable.

II

It is not enough that all persons who have formally joined the corporation at the time of the transaction assent if others are in fact interested and join as part of the original plan.

The fiduciary relation of a promoter is not confined to those persons who at a particular time have become members of the corporation. The courts recognize his obligation to future stockholders who associate themselves with him. He may "defraud future allottees." The acquiescence in any transaction with the corporation of those persons who have at the time become members of the corporation is not therefore the acquiescence of all persons to whom the obligation extends. Only by the acquiescence of all towards whom the fiduciary relation exists can the act of

the promoter in dealing with himself as their agent be validated. If when a transaction takes place there are other persons interested, or if it is then contemplated as part of the scheme that others shall become interested, there can be no complete acquiescence such as to make the transaction binding. A part of the beneficiaries cannot condone a breach of trust. A part of the persons interested cannot bind the rest to an affirmance of a violation of fiduciary duty. Even though in form the persons assenting constitute for the time being the whole corporate body, their assent is unavailing if in substance there are, as part of the enterprise, others equally entitled to protection. Any other rule would effectually prevent relief in most cases, because in the usual course the transaction complained of takes place before there are any stockholders except the promoters themselves.

In *Dickerman* v. *Northern Trust Co.*, 176 U. S. 181, the facts in which appear more fully in the case before the Circuit Court of Appeals, 80 F. R. 450, promoters obtained options on certain manufacturing plants, all of which were taken in the name of or turned over to Stein. A corporation was organized by the promoters, and Stein offered to the corporation the property under option, together with a working capital of two hundred thousand dollars, in exchange for all its stock and an issue of bonds. This proposition was accepted and the stock was transferred by Stein to, or by his orders issued direct to, the owners of the plants. This Court unequivocally declared the transaction a violation of the fiduciary duty of the promoters, but as the case before it was a proceeding to foreclose a mortgage given to secure bonds which were in any event enforceable in the hands of the holders, there was no relief to be granted.

Yeiser v. *U. S. Board & Paper Co.*, 107 F. R. 340, was a precisely similar case. The promoters secured an option, then organized a corporation which accepted their offer to sell the property at an advance. After this subscriptions for stock were taken and eventually the transaction was con-

summated as planned. Here it was the duty to stockholders becoming such after the contract complained of was made that gave a right to relief, and it was on that ground alone that relief was granted. While it appears that a prospectus was issued and used in obtaining subscriptions, there is nothing in the report to indicate that the prospectus was false, and no reference is made in the opinion of the court to the prospectus or to misrepresentation as a ground of relief.

In *Hayward* v. *Leeson*, 176 Mass. 310, all the incorporators and all the persons who were at the time subscribers to the corporation sanctioned the payment to the promoters of seven hundred thousand dollars in stock for their services. The court held that this profit could none the less be recovered, because pursuant to the scheme of the promoters, further subscribers were obtained and stock issued to them. The Court said:

"It is true that the vote, authorizing the issue of this stock to them as the profits which they were to have for the organization of the company, was voted unanimously by all the incorporators of the East Tennessee Land Company and by all who were then subscribers to its capital stock, that is, by all the persons who then had any interest in that corporation; in short, it is true that the fact, that the promoters were to receive $700,000 of paid-up capital stock as remuneration for their services, was disclosed, and consented to, by all the persons who then had any interest in the corporation. But it is also true that at that time no person except the promoters had any interest in the corporation, barring one Mason, in whose name some of the options were subsequently taken, and who was plainly a mere nominee of the promoters; and that at that time no capital stock of the corporation had been issued to the public." 176 Mass. 319.

In *Old Dominion Copper Mining & Smelting Company* v. *Bigelow*, 188 Mass. 315, the Court by Mr. Justice Loring unqualifiedly reaffirmed the doctrine laid down in *Hayward* v. *Leeson*.

In *Erlanger* v. *New Sombrero Phosphate Co.*, 3 A. C.

1218, and in *Gluckstein* v. *Barnes*, (1900) A. C. 240, the companies had come formally into existence when the transactions afterwards set aside were carried out, and all persons who at that time were interested approved, but as the approval was that of the wrongdoers themselves and they purposed obtaining and did obtain, in order completely to carry out their plan, other subscribers, the approval was deemed nugatory.

In the case of *Re British Seamless Paper Box Co.*, L. R. 17 Ch. D. 467, the point under consideration was clearly brought out. A corporation was there formed to take over a going business. No stock was issued to any outsider, and it was not intended so to issue any. Two years later additional stock was issued and in winding up proceedings it was held that towards the subscribers for this stock there was no duty on the part of the promoters, because the issue of that stock was no part of the original plan and promotion. Sir George Jessel based his opinion that there was no promoter's liability explicitly on the ground of

"The subsequent allotment of a portion of the shares not being part of the scheme originally contemplated." P. 475.

At the same time he said:

"I quite agree to this, that if promoters make an arrangement to get a profit for themselves out of what is apparently paid to the vendors, it is immaterial whether the contract with the vendors is approved of by the directors of the company, who are the promoters, just before the allotment or just after: in both cases it is intended to cheat the future shareholders; and of course it makes no difference whatever that the persons who, at the time the allotment was made, were in fact the promoters or their nominees, knew of the fraud. You can defraud future allottees as well as present allottees."

Lord Justice James said, speaking of the promoters:

"If they were intending, though then constituting the whole company, that other people should come in afterwards to whom what had been done would be injurious, the Court would feel no difficulty." P. 477.

In the same case Lord Justice Brett said:

"If when parties are promoters of a company and then become directors, and at the time when they are making a profit to themselves are intending to act not only for the then members of the company, but for future members, and they keep it secret, they can be made liable to account by future shareholders under the 165th section." 17 Ch. D. 477.

These views were approved in *Re Leeds & Hanley Theatres*, (1902) 2 Ch. 809.

Any other result would be deplorable. There is no difference in principle between inducing persons to subscribe for stock before such a transaction and inducing them to subscribe after but as a part of the same plan. In each case alike they are induced to associate themselves with the promoters in a common enterprise, not on a basis of buyer and seller, to which the maxim *caveat emptor* may apply, but on a basis of joint action.

These principles are applicable to the case at bar. The sale made by Bigelow and Lewisohn to the plaintiff corporation was indisputably a sale by promoters to their corporation. Indisputably there was no independent representation of the corporation. The transaction was therefore voidable unless validated by the unanimous acquiescence of all persons interested. It is not enough to show that the promoters and their employees were the only persons who at the time had actually become shareholders, and that they assented to their own act. It must be shown that no other persons were then in substance interested, and that it was not intended to bring in any others as a part of promotion.

FOURTH

IN THE CASE AT BAR THERE WERE PERSONS INTERESTED WHO DID NOT KNOWINGLY ACQUIESCE IN THE SALE.

I

There were stockholders in the corporation on September 18, 1895, when the transaction was completed, who did not acquiesce.

The Circuit Court and the Circuit Court of Appeals disposed of the bill on the ground that the promoters were the only persons interested in the corporation at the time the transaction complained of took place. Judge Lacombe expressly based his opinion on the absence of any other stockholders or subscribers. (136 Fed. R. 915.)

Leaving for the moment the rights of future stockholders, who are brought in as part of the promoters' plan, it is not true that at the important moment there were no other stockholders or subscribers.

The bill alleges that on July 11, 1895, an offer was made by Lewisohn to convey the mining claims to the corporation for thirty thousand shares and that by direction of Lewisohn and Bigelow the directors voted to accept the offer. On September 18, 1895, the directors voted to issue the thirty thousand shares and the mining claims were conveyed. The actual sale to the corporation was not made until September 18. The promoters did not take their profit until then. Only by the action of the directors on that day did it become possible for the promoters to secure this profit. Up to that time the transaction was *in fieri*. An offer had been made and a vote passed accepting it, but so far as appears no other action had been taken, no agreement had been executed, no conveyance made and no payment of consideration by the corporation. Not until September 18, 1895, was the matter closed, and

then it was Bigelow and Lewisohn, the promoters, who "caused" the board of directors to complete the transaction by voting to issue the shares.

On September 18, Bigelow and Lewisohn dominated the corporation. None of the capital stock had been actually issued. They were still acting as promoters and directing the affairs of the corporation. When on that date they caused the corporation to pay the thirty thousand shares of stock for practically worthless property they committed a breach of fiduciary duty both as directors and as promoters. For this act, by which they took this large secret profit, they are accountable as much as they would have been for then taking an additional secret profit.

Since September 18, 1895, is the date of the act by which the wrong complained of was accomplished, it is the date material in determining whether there were others interested or whether it is true, as the Circuit Court of Appeals said, that at the time of the transfer Bigelow, Lewisohn, and their representatives owned the entire issue of stock.

At the time when the transfer was made twenty thousand shares of stock had been subscribed for by outsiders, who knew nothing of the secret profit; and these subscribers subsequently paid for their shares, and by the very vote directing the payment to the promoters the issue of these shares to the subscribers was ordered. Moreover, at this time the members of the Old Dominion Syndicate had become entitled to the shares which were allotted to them.

Clearly the judges of the courts below were in error in assuming that at the time of the transfer — the act now complained of — only the promoters were concerned. The vote passed on July 11, 1895, was undoubtedly a breach of fiduciary duty, but the transaction which this vote contemplated was not carried out until September 18; the transfer which is the basis of complaint was not made until then, and on that date there were innocent subscribers for twenty thousand shares concerned, to say nothing of the syndicate members.

It will be shown that even if the transaction had been completed on July 11 the acquiescence of both the subscribers and the syndicate members would have been essential to its validity, but the allegations of the bill in fact set forth that the transaction was not completed until September 18, at which time the subscriptions for the twenty thousand shares had all been obtained. The decisions in the courts below, therefore, based on the supposed absence when the transfer was made of outside stockholders or subscribers, or on ownership at that time by the promoters of all the capital stock, are palpably erroneous.

II

The subscribers for the twenty thousand shares issued for cash were persons interested, who did not acquiesce.

The plan originally conceived by Lewisohn and Bigelow was to acquire control of the property of the Baltimore Old Dominion Company, to resell that property to a new corporation at a large advance, and to furnish the new corporation with working capital by offering part of its stock for subscription (Bill, par. Third, Rec. p. 3). This plan was carried out precisely as planned. Lewisohn and Bigelow sold to the new corporation on July 11, 1895, all the property of the Baltimore Company, except its cash assets, and sold also the mining claims which are the subject of the present suit. The new corporation thus became endowed with property, but it remained necessary to provide it with working capital. This necessity, which had been foreseen, was met one week later by offering stock to the public as originally planned. The whole operation was completed in September by the issue of all the stock, part for the mining property, part for the mining claims, and part for the cash subscriptions.

It is alleged in the bill and admitted by the demurrer that this means of providing a working capital was a part of

the plan originally formed. Obviously it was necessary for the successful promotion of the corporation that it should be supplied with working capital. This might have been done wholly or in part by Lewisohn and Bigelow themselves offering to furnish the property and the working capital in exchange for stock. Such was the nature of the contract considered by this Court in *Dickerman* v. *Northern Trust Co.*, 176 U. S. 181, and there deemed to result in a plain violation of the promoters' duties.

By whatever rule the relation of the promoters to the subscribers for these shares is tested, the subscribers were entitled to the protection of the principles determining promoters' liability. At the time the sale here complained of was made, the promoters, to apply the language of Lord Justice James, " were intending, though then constituting the whole Company, that other people should come in afterwards to whom what had been done would be injurious."

The subscribers were persons whom the promoters caused to be associated with themselves in order to carry out their plan, give success to their enterprise, and make possible the large profit they sought to secure; persons who were invited to join the corporation because the plan of the incorporators required that working capital should be furnished, and had provided this means of securing it.

The fact that the shares were not offered for subscription until a week after the sale of the mining claims cannot be material. It was still the promoters who caused the corporation to offer the shares for subscription, and to do so was an essential part of their scheme and necessary to its success. Their fiduciary duty still continued. To hold otherwise is to deny the statement of Sir George Jessel that " it is immaterial whether the contract with the vendors is approved by the directors of the company, who are the promoters, just before the allotment or just after " (17 Ch. D. 467, 471) and to deny the possibility of a promoter defrauding future stockholders. Applying the test laid down in *Tompkins* v. *Sperry*, 96 Md. 560, 582, other persons than the promoters themselves were " induced to

come into it by concealment or misrepresentation of the facts" and "have furnished all or part of the capital embarked in the enterprise." In the present case concealment and not misrepresentation was the means employed.

The fact that the money paid for these shares supplied working capital instead of being used in payment for the property is immaterial.

The capital furnished by the subscribers was as essential to the success of the enterprise, whether the promoters intended to achieve success in the stock market or in the operation of the mine, as money used to purchase the mining property. It is not true that when promoters from their own funds and from public subscription for stock provide a corporation with fixed and working capital, they can protect themselves from liability, whatever frauds they commit, by using the contributions from the public as working capital and not fixed capital. It is difficult to conjecture how such a rule could be defended or how reconciled with the view taken by this Court of the transaction in *Dickerman* v. *Northern Trust Co.*, 176 U. S. 181.

The judge of the Circuit Court and the judges of the Circuit Court of Appeals appear to have assumed that the issue of the shares was a transaction independent of all that went before, to be dealt with as if it had been an increase of capital at some indefinite future time, after the promoters had accomplished their purpose and had ceased to act as such. It is unnecessary to discuss the question thus raised as to the rights of subscribers for an issue of stock forming no part of the promoters' enterprise, for the assumption is contrary to the allegations in the bill. The issue of the twenty thousand shares was an integral part of the promoters' plan, and was necessary in order that the corporation should be more than a name. It was the means provided for furnishing working capital of which otherwise the corporation having purchased none of the cash assets would be wholly destitute. Until this part of the plan was carried out the corporation could do nothing.

The promoters planned from the outset to bring in these subscribers, in order to obtain from them the means of operating the mine (Bill, par. Third, Rec. p. 3). It was pursuant to this plan and for this purpose that the promoters caused the corporation to offer the stock for subscription (Bill, par. Fifteenth, Rec. p. 9). The issue of this stock and of all the other stock was authorized simultaneously (Bill, par. Sixteenth, Rec. p. 9).

Counsel for the appellees have contended that the subscribers for these shares were only vendees from the corporation, and that it does not appear that they were informed of Lewisohn's and Bigelow's plan, or that the subscriptions were based upon anything done or intended by the promoters. The subscribers were vendees in the same sense as if they had subscribed before the sale complained of was made, in the same sense as every subscriber for stock upon the original issue by a corporation is a vendee, and in no other sense. This suit does not involve as counsel seem to suppose any complaint against the corporation for disposing of the stock. Nor is the right of recovery based on any misrepresentation by which these individuals were led to subscribe. The right rests upon the fact that these individuals were persons towards whom the promoters stood in a fiduciary relation. They were persons whom the promoters intended to bring in as members of the corporation. They were " future allottees " who as well as present allottees might be defrauded. Persons whose right to protection is precisely the same in principle and on the authorities as if they had subscribed for stock before the offer was made. The continuity of purpose on the part of Bigelow and Lewisohn, their intentions and the objects which they had in view are not set forth as facts which influenced the action of the subscribers for stock, but as showing what would perhaps be sufficiently apparent without, — that the entire course of proceedings down to the issue of all the stock was one transaction and not several.

The real ground of complaint is that Lewisohn and Bigelow concealed from these subscribers the fact that they,

Lewisohn and Bigelow, had made a contract very much to their own advantage, acting in anticipation of the subscribers becoming stockholders, and while intending them to do so. It is wholly immaterial in such a cause of action whether the subscribers knew that Lewisohn and Bigelow intended the proceeds of this stock to supply working capital or not.

The learned counsel for the appellees have contended also that there could be no fiduciary relation between the promoters and these subscribers because such a relation must result, if at all, from some agreement to that end, express or implied, between two or more persons. In no case has it been held that the fiduciary relation of a promoter must arise from an express contract, or from an implied contract, except such contract, if one chooses to call it so, as may be implied from the mere transaction. In *Erlanger* v. *New Sombrero Phosphate Co.*, 3 A. C. 1218, for example, the shares of the company were offered, as here, for public subscription. The prospectus created no contract. If the prospectus was false and created a liability, it was, as Lord Blackburn pointed out, a liability to the individual and not to the company, yet the company was entitled to rescind because of the breach of fiduciary duty on the part of the promoters in not disclosing the profit they were making.

Finally, counsel for the appellees have contended that there was no injury done to the corporation or to the subscribers. The wrong complained of is the sale to the corporation for thirty thousand shares of its stock of property which cost the promoters nothing, and was practically valueless. The corporation for no consideration parted with shares that were worth seven hundred and fifty thousand dollars. Yet it is said the corporation lost nothing. The subscribers for shares received shares which were necessarily worth less than if thirty thousand other shares in the corporation had not been issued for no value. If the promoters had sold their property without taking this profit, either the corporation would have had thirty thou-

sand shares less outstanding, and each share would have been so much the more valuable, or its assets would have been increased by the proceeds of thirty thousand shares issued for value. The fact that the shares had a market value equal to the subscription price does not show that the subscribers lost nothing if, in fact, their shares would, but for the promoters' wrongdoing, have been more valuable. In an action at law for deceit the cost of the property to the vendor might, in the absence of a misrepresentation, be no concern of the subscriber, and this is the rule which counsel for the respondents lays down as controlling the present case, but it has uniformly been held in a question of fiduciary relations that the cost of property to a trustee who sells it to his beneficiary is a matter of concern to the beneficiary, of concern so deep that if undisclosed the sale may be set aside.

As to the offer to sell made and accepted on July 11, 1895, the subscribers are persons brought in by the promoters, after the act indeed, but as part of the original plan; as to the actual completion of the sale, issue of the stock and taking of the profit they are persons who at the time of the act had become subscribers for stock; as to each act alike their acquiescence was necessary.

III

The members of the Old Dominion Syndicate were persons interested who did not acquiesce.

Even if no shares had been offered to the public for subscription, the promoters would have been liable for nondisclosure to and lack of acquiescence by the other members of the Old Dominion Syndicate. The members of the syndicate were persons interested in the corporation and in the enterprise at the time of the sale, and their assent was necessary to give validity to the act of the promoters as directors under which they took this profit to themselves as vendors.

The Old Dominion Syndicate was formed to provide money with which to purchase the property or stock of the Baltimore Old Dominion Company with a view to its resale. Lewisohn and Bigelow acted for the syndicate; with its money they purchased the stock in the Baltimore Old Dominion Company by control of which the sale to the corporation was made. The proceeds of the sale to the corporation was the property, in equity at least, of the syndicate, and eighty thousand shares of stock were divided among its members in recognition of this right.

The members of the syndicate were not stockholders at the time the sale complained of was made, but it has been shown that this is immaterial if they were persons intended by the promoters to become stockholders. The members of the syndicate were such persons; they did become stockholders pursuant to the original plan of the promoters for carrying out the enterprise. They joined in the common enterprise of forming the corporation to take over the mining property.

The stock of the Baltimore Old Dominion Company, the ownership of which enabled the property of that corporation to be sold for stock to the plaintiff, was purchased with the syndicate's money. The members of the syndicate were in equity entitled to the proceeds of what their money purchased. The syndicate contract provided that the members should share *pro rata* in the profit of the sale to the new corporation (Bill, par. Fourth, Rec. p. 4). They took the stock allotted them therefore as of right, precisely as if each had subscribed for that amount of stock, his subscription being payable by assignment of his undivided interest in the property transferred. Had the syndicate acquired the property which was transferred to the corporation and then agreed to transfer it in exchange for stock, the relation of such members would have been precisely the same as that of the complaining stockholders in *Dickerman* v. *Northern Trust Co.*, 176 U. S. 181. What they might have done directly, the syndicate, as a matter of convenience, did indirectly; each member by his contri-

bution became entitled to a share as *cestui que trust* instead of as tenant in common. Lewisohn and Bigelow managed the syndicate, but they were responsible to its members. The stock allotted to the members of the syndicate came to them exactly as if given in satisfaction of a subscription made for them by their managers.

It has been objected on the part of the respondent that the syndicate contract was not with the corporation, created no relation between the corporation and the members, and, therefore, could not be the basis of any recovery by the corporation; that the syndicate members did not acquire their stock from the corporation, but from the promoters, and that because the syndicate was formed to make a profit from the sale of the mining property, the members could not complain of another profit made by Lewisohn and Bigelow alone from the sale of the mining claims. All of these objections are founded on the misapprehension of the facts or of the rules of law applicable.

The syndicate contract is not relied upon as the basis for recovery by the corporation. That contract was made between the promoters and the syndicate members, each representing only himself. For a breach of that contract the remedy would not be an action by the corporation, but an action by the individuals concerned. That contract, however, entitled the syndicate members to become stockholders in the corporation. They did become stockholders. It was intended by the promoters that they should become stockholders and should furnish the money for acquiring the property sold. They are, therefore, within the class of persons to whom a fiduciary duty is due as much as if they had subscribed for shares instead of for membership in the syndicate subsequently to be converted into shares.

The members of the syndicate being then by virtue of the syndicate agreement in the same position as shareholders, the promoters as to them were under the usual fiduciary duty of a promoter. The sale of the mining claims was not a transaction governed by the syndicate agreement. It was a separate transaction with reference

to which the syndicate members had the same right to disclosure as any other intended member of the corporation, a right founded not on the terms of their contract, but on the obligation due to them as future stockholders, the same obligation adverted to by this Court in *Dickerman* v. *Northern Trust Co.* as protecting persons who, pursuant to independent contracts with the promoters, contracts made when no fiduciary relation existed, were to become stockholders. When Lewisohn and Bigelow took their profit from the sale of the mining shares they did not violate the terms of the syndicate agreement, but they violated the duty owing to the syndicate members as future stockholders, made such by the rights given them through the syndicate contract.

The case as to the members of the syndicate is precisely the same as that presented in *Arnold* v. *Searing*, 67 Atl. Rep. 832, decided in the Court of Chancery of New Jersey. In that case a bill was filed to recover profits made by promoters who had issued " syndicate shares " to obtain money with which to take up options on stock in a corporation with a view to merging that corporation with a new corporation. The merger was effected; securities of the corporation thus created were issued to the promoters as the stockholders in the old corporation, and by them distributed pursuant to the syndicate agreement, but the promoters retained a large profit. Members of the syndicate who had thus acquired, nominally from the promoters, shares in the new corporation brought a stockholders' bill to enforce the claim of the new corporation to recover the secret profit. The Court held that the suit could be maintained, — that the syndicate members occupied in substance the same position as if they had received their shares directly as original subscribers.

The position of the syndicate subscribers is not analogous to that of persons who have by contract made while dealing with promoters at arm's length undertaken to accept a specified amount of stock out of a total specified capitalization in payment for their property. In the latter case

if the specified stock is delivered there is no ground of complaint. The promoter in making his bargain has dealt with an independent person to whom he was under no duty and the transaction with the corporation is merely a consummation of the preliminary bargains.

There is no evidence that in this case the syndicate members joined in a plan to make, to the extent of the profit shared by them, a profit not disclosed to other stockholders. If such were shown to be the case, it would not be material, because that profit is not now in question. Their complaint is that the promoters who as to them were under the usual duty of promoters took in a separate transaction a secret profit. They are in no way estopped as holding stock received from the promoters, because their right to stock arose from their subscriptions, and the shares they actually received came not from the promoters but from a man of straw who received for convenience and distributed directly to the persons interested the whole consideration received for the mining property.

The real test of whether persons who become members of a corporation are, at the time a sale to it is made, in such a position that their acquiescence is necessary to validate the sale, is whether they became members pursuant to the plans of the promoters; whether it is a part of the enterprise that such persons shall join the corporation; whether the scheme of the promoters is incomplete and not finally carried out until they do so. If under such conditions a person acquires stock by direct subscription, he is in a position to complain through the corporation if a secret profit is taken, whether the subscription is before or after the transaction complained of. Equally, if he acquires his stock not directly from the corporation, but indirectly, according to a prearranged plan for the issue of the stock and the promotion of the enterprise, he may complain through the corporation.

See *Brewster* v. *Hatch*, 122 N. Y. 349.

If, on the other hand, he acquires his stock by mere purchase from the promoters, no question of fiduciary duty arises.

Counsel for the defendants has contended on the authority of *Hutchinson* v. *Simpson*, 92 App. Div. 382, that nondisclosure was as to the members of the syndicate no breach of a fiduciary duty. In other words, that the approval of the promoters themselves prior to the syndicate members becoming stockholders was a binding acquiescence. The facts in the case referred to are not so parallel to the facts here as to warrant this conclusion. In that case, according to the interpretation put on the facts by a majority of the Court, all the stock was issued to Moore and Schley for property which they purchased and transferred to the corporation. So far as appears, Moore and Schley were under no obligation to any one as to the disposition of this stock except so far as they had made contracts to sell it or to transfer it in payment of personal obligations of themselves or their agent. The disposition of the stock was deemed to be a part of their plan only as it would have been if they had previously arranged to obtain money by pledge of the stock. On the other hand, in the present case the syndicate members were to become stockholders and did become stockholders as joint adventurers pursuant to the original plan, and if the corporation had been composed only of them and the promoters, the corporation, as representing their collective rights, could have maintained this suit for breach of the fiduciary duty of the promoters.

IV

There was clearly no disclosure and therefore no acquiescence if persons other than the promoters themselves were concerned.

If it is once established that the acquiescence either of the subscribers to the twenty thousand shares or of the syndicate members was necessary to validate the sale, it is clear

that there was no disclosure and so there could be no acquiescence. Only on the theory that the vote of the promoters as directors, passed when there were only forty shares of stock outstanding, bound all future stockholders, because the knowledge of the holders of the forty shares constituted knowledge by the corporation, can it be pretended that there was any disclosure. Neither the subscribers nor the syndicate members, other than the promoters, had any knowledge that thirty thousand shares were being taken as a profit on the sale of substantially worthless property.

Where promoters are in absolute control and with their agents constitute all the members of the corporation for the time being, there can be no disclosure and no knowledge binding upon the corporation or future members.

Lord Macnaghten in *Gluckstein* v. *Barnes*, (1900) A. C. 240, 249, said as to such a case:

> "With all deference to the learned counsel for the appellant, that seems to me to be absurd. 'Disclosure' is not the most appropriate word to use when a person who plays many parts announces to himself in one character what he has done and is doing in another. To talk of disclosure to the thing called the company, when as yet there were no shareholders, is a mere farce. To the intended shareholders there was no disclosure at all. On them was practised an elaborate system of deception."

Counsel for the appellees have argued that disclosure of this profit was not "a practical course." That such a disclosure would have prevented carrying out their scheme, and in that sense was not practical, is true; but in no other sense is there any difficulty. The requirement of disclosure does not extend, as this argument suggests, to future dealings in the stock. It has never been deemed necessary for a promoter, in selling in the ordinary course stock which he has acquired, to inform the purchaser of the facts as to the bringing out of the company. The duty of disclosure rests upon the promoters with respect to those persons who become members of the corporation, at their instance, as

part of their scheme for floating the enterprise. It is a duty that may be performed by publishing a truthful and candid prospectus or by giving notice to the individuals, or in any other manner that actually and effectually apprises those persons of the facts, so that they may properly be held to have approved or acquiesced in the transaction.

At the time the sale complained of was made forty shares of stock in the corporation had been subscribed for. The relation of these subscribers to the corporation as members was of such a formal nature that the directors at once proceeded to dispose of the entire one hundred and fifty thousand shares of authorized capital as if no shares were outstanding. Obviously the promoters meant to deal with a corporation having actual members. Obviously they intended that there should be a full body of stockholders. Obviously the persons who joined the corporation pursuant to plans originally formed by the promoters, and in the orderly and expeditious carrying out of those plans, were persons to whom, according to all the authorities, the promoters owed a fiduciary duty. Yet it is seriously contended that because the promoters in their capacity of directors voted to purchase from themselves, when only forty shares of stock had been subscribed, — shares which were subsequently disregarded in the actual issue of the stock, — the corporation and all its members are to be held bound by acquiescence, whereas if the plans of the incorporators had been carried out in precisely the same manner except that the shares for working capital had been subscribed for and the shares for the syndicate allotted before instead of after the sale, the promoters would have been liable. If the liability of promoters rested upon some arbitrary rule of law, such an irrational and unintelligent distinction might be a necessity. But the liability, far from being the result of an arbitrary rule of law, is a practical application of deep-rooted and fundamental principles of equity. To make its enforcement depend upon the form instead of the substance of a transaction is to cause a serious miscarriage of justice.

FIFTH

THE CASE AT BAR IS ENTIRELY DIFFERENT FROM THOSE CASES IN WHICH THE PROMOTERS TAKE ALL THE STOCK AND SUBSEQUENTLY SELL PART TO OTHER PERSONS.

The decision of the Circuit Court and of the Circuit Court of Appeals apparently proceeded upon the theory that because at the time the offer was made and accepted the only members of the corporation were the promoters themselves, who necessarily knew of and acquiesced in the sale, therefore there could be no cause of complaint. This view proceeds upon a confusion between two vitally distinct classes of cases.

If the owners of property determine to form a corporation to take over the property and in pursuance of that plan sell to the corporation so formed, themselves taking all the stock, they act for no one but themselves. It is not a part of their plan for any one else to come in; no one joins with them in the enterprise; no one is interested but themselves; they have no beneficiaries; and they are under no fiduciary duty. If they subsequently as an unconnected transaction sell stock they are under no fiduciary duty to the purchasers. Such a case was that of *Re Ambrose Lake Tin & Copper Mining Co.*, 14 Ch. D. 390.

If on the other hand the promoters organize a corporation to buy their property and as a part of their plan propose to have and do have others join with them, so that their plan is in part at least carried out by the use of other people's money, whether that money is used to provide the corporation with fixed capital or with working capital, then there are others interested; the promoters in such a case act for the persons whom they design to bring in; those persons are their beneficiaries; to those persons they owe a fiduciary duty; and for any breach of such duty those persons are entitled through the corporation to relief.

In the one class of cases there is a purchase of stock and no relation except that of vendor and purchaser. In the other class of cases there is a joint enterprise in which the subscribers for stock are interested with the promoters, the promoters act as the agents and representatives of all those interested, and there is a fiduciary relation. The distinction between the two classes of cases has long been recognized. Mr. Morawetz after discussing the case of frauds by promoters of which *Erlanger* v. *New Sombrero Phosphate Co.*, 3 App. Cas. 1218, is typical, and pointing out the right of the corporation, as representing the collective corporate rights of the shareholders to recover, says:

"On the other hand, in *Parsons* v. *Hayes*, and *Re Ambrose Lake, etc., Mining Co.*, the collective rights of the shareholders were not infringed. The charge made in these cases was, that the directors had issued the entire stock of the company as paid-up stock, for property worth less than the par amount. No person was injured in the least degree by these transactions. If the persons to whom the stock was first issued afterwards sold a portion of it, and deceived the purchasers by a false representation that the par value of the shares had been paid into the company's treasury, they would clearly be liable to the purchaser for the fraud. And under these circumstances the directors who issued the false certificates representing that the company's capital had been paid up according to law might perhaps be charged also by reason of their complicity. But in a case of this kind the plaintiff's claim would be merely for the damages caused by the deception, and the extent of the injury would depend in each case upon the price paid by the plaintiff for the shares, and their market value when the deception was discovered." 1 Morawetz on Private Corporations, 2d ed., sec. 292.

All the cases relied upon by the appellees and all the cases relied upon by the Circuit Court of Appeals as showing that in the present case there was no wrong done the corporation, belong to the class of cases referred to by Mr. Morawetz. In all the transaction complained of was a sale to a corporation for its whole capital stock. All the

stock was issued to the alleged wrongdoers. No other person was connected with the enterprise or became connected with it, and it was not a part of the plan that any other person should become connected with it except as a purchaser of stock from the promoters. All those persons who, by becoming members of the corporation, completed its formation, made it more than a skeleton, and constituted it a going concern, acquiesced in the transaction. No person became a member of the corporation as a part of the plan for its formation without full knowledge and acquiescence. No individual was injured except by paying too high a price for stock already issued and outstanding.

In *Foster* v. *Seymour*, 23 F. R. 65, one of the cases relied on, the bill alleged that the trustees of a corporation issued all its capital stock to themselves, in exchange for property owned by them, and "after such exchange of the capital stock, divided and distributed it among themselves, and sold it as fully paid stock to innocent purchasers, including the complainant." The Court necessarily held that the sale to the corporation was valid; the stock might not be fully paid for, the persons who bought the stock subsequently might suffer from paying too high a price, but the vendors had made no profit except by selling, for more than it was worth, stock belonging to themselves.

In *McCracken* v. *Robison*, 57 F. R. 375, another case relied on, certain persons formed a railroad company, and had the corporation contract with the defendants that the latter should turn over the road fully constructed and equipped in return for all the capital stock and bonds. Simultaneously the defendants agreed to pay the promoters half the profit made from the sale of the stock and bonds. Subsequently for this latter agreement was substituted a promise to pay a specified sum. The defendants sought to avoid this promise on the ground of illegality. The Court held that no breach of fiduciary duty was shown. The only persons interested in the enterprise were

the promoters themselves. Whoever became interested in the stock of the corporation acquired such interest only by purchase from the persons who contracted with the corporation.

Stewart v. *St. Louis, etc. R. Co.*, 41 F. R. 736, was a precisely similar case. All the stock of a railroad corporation was issued in payment for the railroad to the persons who controlled the corporation. No one else was concerned.

In *Parsons* v. *Hayes*, 14 Abbott N. C. 419, all the stock in the corporation was issued to the vendor, who, by agreement, turned over a part of it to the directors for their personal benefit. Subsequently shares were sold by them or by the vendor. The plaintiff was a purchaser of shares, and sought by a stockholder's bill to make the directors account for the difference between the par value of the stock issued and the real value of the property. The Court held that the suit could not be maintained.

In *Barr* v. *New York, L. E. & W. R. R. Co.*, 125 N. Y. 263, a suit was brought by a minority stockholder in another railroad company to enforce payment of rental by the defendant company. The plaintiff's right to sue was assailed on the ground that he received his stock under a contract that was fraudulent. The contract in question was for the construction of the road in exchange for all its stock and bonds. The construction contract was made for the benefit of a syndicate comprising all the directors and stockholders of the company. The Court said:

> "As the members of the syndicate were practically the company and composed the whole number of stockholders, there was no one to object." P. 273.

No one was concerned in the corporation except the members of the syndicate, and no one could or did become interested except by purchase from them. On this ground the Court held that the plaintiff's right to sue could not be impeached. The contract of lease on which the plaintiff sought to recover was impeached on the ground that it

was made by the directors of the Erie Railroad Company, the defendant's predecessor, for the benefit of themselves as stockholders in the lesser corporation. The Court held that though the contract was voidable in its inception, it had been ratified by knowing acquiescence.

In *Seymour* v. *Spring Forest Cemetery Assoc.*, 144 N. Y. 333, co-tenants sold real estate to a corporation, formed by them for the purpose, taking in payment bonds of the corporation. The Court held that the sale could not be impeached because the vendors were themselves all the persons interested.

"If they were the vendors on the one hand, dealing with themselves in a corporate capacity on the other, they were also the sole beneficiaries to be affected, and could not defraud themselves. . . . As beneficiaries, the stockholders necessarily assented to all the details of the arrangement, and no just criticism is possible either upon the legality or morality of the transaction." 144 N. Y. 340.

In *Hutchinson* v. *Simpson*, 92 App. Div. 382, an attempt was made to recover stock taken by Moore and Schley, as a profit on the organization of the American Malting Co. The facts showed that Moore and Schley entered into contracts with various persons by which the latter undertook to take stock in a corporation to be formed for the purpose of acquiring various plants on which Moore and Schley had options. The plants were turned over with a specified sum in cash for working capital in exchange for all the stock in the corporation. Moore and Schley then distributed the stock among those who had agreed with them to purchase it, and retained a large surplus remaining as an undisclosed profit to themselves. Three out of the five members of the court were of opinion that there was no cause of action, because the transaction by which the stock passed to persons who had agreed to take it was a sale to them by Moore and Schley, and not a contract between them and the corporation. The other two members of the Court were of opinion that in substance the transaction was

a subscription for stock, and that Moore and Schley were liable as promoters. Judge Patterson, one of the majority, in concurring (p. 407), expressly approved the doctrines of law laid down by the minority, while holding them inapplicable to the facts. The case was taken to the Court of Appeals, but was settled before it was reached. It may well be questioned whether the decision of the majority of the Court as to the facts was well founded. There would seem to have been good ground for contending that in reality the persons who purchased stock from Moore and Schley were in substance original subscribers; but however this may be, the decision deals only with the interpretation to be put upon the particular facts of the case.

Insurance Press v. *Montauk F. D. Wire Co.*, 103 App. Div. 472, was similar to *Parsons* v. *Hayes*. All the stock was issued to certain persons in exchange for certain patents. No one was concerned in the transaction complained of except the parties to it. Outside stockholders, including the plaintiff, became such subsequently as purchasers.

Tompkins v. *Sperry*, 96 Md. 560, is much relied on by the appellees. In that case the promoters took all the stock of the corporation in payment for property which they transferred to it. They had purchased certain property, they sold it to the corporation for all the capital stock, and disposed of the latter for their own benefit. The Court said of the transaction:

"It is entirely consistent with the exhibits on which the allegations of the bill rest that these gentlemen should have purchased the properties on their own account with a view to capitalize their combined value by turning them into the company in payment for its bonds and stock." 96 Md. 579.

Distinguishing the case from those in which a fiduciary duty is violated, the Court said:

"The true test of the responsibility of parties occupying positions such as Sperry & Jones did in putting the brewing properties into the company in this case, is whether other persons than themselves hold stock in the company and are not made aware of the

true state of facts, or are induced to come into it by concealment or misrepresentation of the facts, or have furnished all or part of the capital embarked in the enterprise and are misled or kept in the dark as to the actual transaction." 96 Md. 582.

The case of *Blum* v. *Whitney*, 185 N. Y. 232, is of the same character. There the Distilling Company of America was formed pursuant to a written agreement which stated that a certain amount of stock was to be issued for each of certain specified properties. The ground of complaint alleged was that one of the properties, The Hannis Distilling Company, was acquired by persons interested in the formation of the Distilling Company of America at a price which gave them a profit. The Court of Appeals of New York held that the bill showed no cause of action because the distribution of the stock was expressly agreed upon by all the persons interested. The Court said:

"The stockholders of the constituent companies and the individual defendants were the organizers of the corporation and became its first stockholders; they dealt wholly between themselves as sellers and buyers, organizers and corporations; no other persons had any interest in this initial transaction." P. 241.

Each of the persons interested in the original issue of stock deliberately assented, by becoming a party to the agreement, to the allotment of stock among the various properties to be acquired. The promoters who had themselves acquired the Hannis Distilling Company did not assume to decide for their associates the price at which that property should go into the new corporation. Their original proposal was that the Hannis Distilling Company should receive an amount of stock shown by the agreement, and all persons who joined in the new corporation, exercising their independent judgment and discretion, voluntarily acquiesced in that allotment. The bargain for the benefit of the promoters was really made not between them and the corporation when the latter acquired their property, but between them and the several individuals who joined in the agreement to form the corporation, when the

latter assented to the price proposed. The sale to the corporation was merely the consummation of the agreement already made, and in making that original agreement the promoters acted only for themselves and at arm's length.

The English authorities show the same distinction.

In *Salomon* v. *Salomon*, (1897) A. C. 22, there actually was but one man interested in the formation of the corporation; he owned the corporation as he owned the business which was sold to the corporation. No profit which he took in making the sale to the corporation, no over-valuation of the property transferred, could affect any person.

In *Ambrose Lake Tin & Copper Mining Co.*, 14 Ch. D. 390, the owners of a mining enterprise formed a corporation and took all the stock in payment for a transfer of the mine. No one was concerned except the original owners of the property. No one could thereafter become concerned except by purchase from them. The Court held that as all persons interested had acquiesced the transaction was necessarily valid.

Re British Seamless Paper Box Co., L. R. 17 Ch. D. 467, followed the earlier case in holding that upon the formation of a private company, where no stock is to be issued except to persons acquiescing, the transfer to the corporation is valid. In neither case was any doubt cast upon the general doctrine that without the consent of all persons interested a sale by promoters may be impeached.

There is no conflict of legal doctrine between any of the cases referred to. In none of the cases relied on by the respondents are the principles laid down in the case of *Erlanger* v. *New Sombrero Phosphate Co.*, and the cases following it, questioned. The distinction between the two classes of cases is a difference in the facts, not in the law applicable to the facts. In each of the cases referred to, where liability was denied, the Court rested on the ground that all the persons concerned had acquiesced, including among the persons concerned all whom it was intended should come in. The only possible criticism of any of the cases is as to the interpretation put upon the facts in deter-

mining whether certain persons who had acquiesced, and had not been informed, were concerned in the enterprise, and therefore in the transaction complained of, or were merely dealing with the promoters as individuals.

In the case at bar no such state of facts is presented. Neither in form nor in substance did the subscribers or the syndicate members obtain their stock from the promoters. The subscribers acquired their stock direct from the corporation as an original issue contemplated as part of the scheme of promotion. The syndicate members obtained their stock from a nominee of the Baltimore Old Dominion Company pursuant to the arrangement by which their money had been used to purchase that company; they also therefore virtually took their stock direct from the plaintiff as an original issue made as part of the scheme of promotion.

SIXTH

THE APPELLEES HAVE FAILED TO DISTINGUISH THE CASE AT BAR FROM THOSE CASES IN WHICH, BECAUSE A FIDUCIARY RELATION EXISTED TO PERSONS WHO DID NOT ACQUIESCE, THE TRANSACTION WAS VOIDABLE.

The appellees have advanced various grounds to distinguish the case at bar from those in which relief has been granted against promoters. None of these grounds are tenable.

They have argued that the subscribers for the twenty thousand shares had no connection with the enterprise, but were practically in the same position as subscribers for an increase of capital made at some indefinite future time. The argument disregards the fact that the subscriptions were obtained as part of the plan of promotion and to complete the transaction. The same argument would if sound have been fatal in the Erlanger case, in *Hayward* v. *Leeson*, and in *Yeiser* v. *U. S. Board & Paper Co.* In all of those cases the subscriptions were taken after the contract complained of had been made.

They have argued that the syndicate members cannot be regarded because they were not subscribers for stock and because their rights were regulated by the syndicate contract with which the corporation had no concern. The argument fails to take into account that while the syndicate contract imposed no fiduciary obligation on Lewisohn and Bigelow as promoters its effect was to make the syndicate members to all intents and purposes subscribers and as such entitled to the same protection as other subscribers. The syndicate contract was not, as in *Blum* v. *Whitney*, 185 N. Y. 232, an agreement made between independent contracting parties defining what each should receive. It was merely the means through which the members of the syndicate were introduced to participation in the enterprise substantially as subscribers for stock and as such in the usual relation to the promoters. In *Blum* v. *Whitney* the contract was one by which each person contracting with the promoters accepted a bargain for the largest amount of stock that he could get, knowing, when he accepted, what amount each of the others was to get.

They have argued that because no prospectus was issued here the authorities referred to are inapplicable. But the alleged distinction is untenable in principle, has been expressly repudiated by Lord Blackburn in the House of Lords and by the Supreme Judicial Court of Massachusetts, and has nowhere been relied on.

Counsel for the appellees in their brief before the Circuit Court of Appeals declared that none of the original subscribers for stock and none of the syndicate members had been found objecting to the transaction in question, and that this showed acquiescence and should prevent the sale being inquired into now. The record contains nothing to warrant these assertions. The only inaction which could show acquiescence would be inaction with knowledge of the facts. It is alleged in the bill (par. Twenty-second, Record, p. 15) that neither the subscribers nor the syndicate members knew of the facts, and that until April 4, 1902, when Bigelow ceased to be president, the appellant

had no knowledge or information as to the profit made. It does not appear therefore that there was any inaction on the part of the syndicate members or of the subscribers except as a result of ignorance of the facts. Any argument based on the assumption of inaction with knowledge must be disregarded as involving an unwarranted assumption of facts not before the Court.

In the final analysis the appellees' argument is the bare proposition that upon the formation of the corporation with forty shares of stock paid in the fiduciary relation of the promoters ended, and that from that time they were free to do whatever they themselves as the holders of the forty shares approved; that because the forty shares were the entire issued stock of the corporation at the time, therefore the acquiescence of the forty shares was the acquiescence of all persons interested. To support this proposition the appellees would have the remaining one hundred and forty-nine thousand nine hundred and sixty shares looked upon as stock reserved by the corporation for issue at some indefinite future time, although when the stock was actually issued one hundred and fifty thousand shares were issued, the prior issue of the forty shares being wholly disregarded.

Such a proposition is repugnant both morally and legally. It does not represent the business or the legal view of the actual facts, and it disregards an unbroken series of decisions.

Where, as in *Blum* v. *Whitney*, a certain amount of stock is designedly reserved for future use at some time after the transaction of forming the corporation and putting it in a position to transact its business is completed, the assent of all persons who up to the completion of the transaction are concerned may be sufficient. The stock reserved is to all intents and purposes in the same situation as stock which might be authorized by future amendment of the articles of incorporation and is unconnected with the inception of the enterprise. Such a case is utterly different from the position taken by the appellees that

whenever any stock has been issued the assent of the holders is sufficient, although the issue is only the first step in one transaction.

From a business standpoint the "floating" of the plaintiff corporation was not completed until all the stock which was to be issued in order to put it in a position to fulfil the purposes of its incorporation had been issued. From a legal standpoint the same thing is true, and the promoters could not deal with the corporation for their own benefit without the assent of all persons who became members of the corporation in carrying out the plan for its complete organization.

SEVENTH

THE PLAINTIFF CORPORATION IS ENTITLED TO A RESCISSION OF THE SALE AND A RETURN OF THE CONSIDERATION, OR IN THE ALTERNATIVE TO AN ACCOUNT OF PROFITS MADE BY THE SALE.

I

The right to relief is in the corporation and not in the individual stockholders.

The grounds on which relief may be obtained by a corporation, as distinguished from an individual stockholder, in cases like the present, have already been fully considered. The courts have uniformly given effect to these considerations and granted relief at the suit of the corporation.

Yeiser v. *U. S. Board & Paper Co.*, 107 F. R. 340.
Hayward v. *Leeson*, 176 Mass. 310.
Old Dominion Copper Mining & Smelting Co. v. *Bigelow*, 188 Mass. 315.
Yale Gas Stove Co. v. *Wilcox*, 64 Conn. 101.
Erlanger v. *New Sombrero Phosphate Co.*, 5 Ch. D. 73; 3 App. Cas. 1218.

II

Rescission is the appropriate relief.

It has always been assumed by the courts that a contract voidable because one of the parties stood in a fiduciary relation to the other could be rescinded at the option of the latter, unless there were special facts making such relief impracticable.

The right to rescind the contract clearly follows from the principles already laid down. Indeed, the meaning of calling the contract voidable is that the corporation has a right to rescind (1 Morawetz on Private Corporations, 2d ed., sec. 524), and, as an incident of such rescission, of course to recover the consideration paid.

Accordingly, it is the rule that sales to or other transactions with a corporation vitiated by the participation therein of directors or promoters adversely interested will be set aside at the instance of the corporation.

Wardell v. *Railroad Co.*, 103 U. S. 651.
Yeiser v. *U. S. Board & Paper Co.*, 107 F. R. 340.
Old Dominion Copper Mining & Smelting Co. v. *Bigelow*, 188 Mass. 315.
Hebgen v. *Koeffler*, 97 Wis. 313.
Erlanger v. *New Sombrero Phosphate Co.*, 3 App. Cas. 1218.
Lindsay Petroleum Co. v. *Hurd*, L. R. 5 P. C. 221.
Phosphate Sewage Co. v. *Hartmont*, 5 Ch. D. 394.

It may be presumed that on demurrer the Court will not say that rescission is impracticable.

III

The lapse of time is no bar to a rescission.

There is no rule of law requiring that a right to rescind be exercised within a prescribed time. The question in each case is whether the plaintiff seeking rescission has acted with reasonable diligence, and in determining this question the Court will consider the facts of each case. If there has been no delay to enable the plaintiff to speculate on the chances of the transaction proving profitable, no change in the condition of the property rendering rescission unjust, and a satisfactory explanation of the delay, mere lapse of time will not bar the right to relief.

In *Erlanger* v. *New Sombrero Phosphate Co.*, 3 App. Cas. 1218, the suit to rescind was begun about fourteen months after the sale complained of, and after operations had been carried on upon the island which was the subject of the purchase. But, as the suit was begun promptly upon the facts invalidating the sale becoming known, the Court allowed a rescission.

In *Lindsay Petroleum Co.* v. *Hurd*, L. R. 5 P. C. 221, the suit for rescission was begun a year and a half after the sale; but, as proceedings were taken promptly upon discovery of the facts, the Court held that the sale could be rescinded.

Rescission stands, so far as the lapse of time unaccompanied by other circumstances rendering it unjust or improper is concerned, on the same basis as recovery of secret profits. The cause of action is the same; the difference is which alternative relief shall be granted. The decisions of the courts in cases where relief has been granted in the shape of an accounting for profits, or recovery of damages on a sale vitiated by violation of duty on the part of one in a fiduciary position, are, therefore, of equal weight in determining whether the cause of action

is so barred by lapse of time that relief by rescission shall not be granted.

In *Hayward* v. *Leeson*, 176 Mass. 310, one of the defences set up was that the land sold had not been tendered back; in other words, that the plaintiff had not asked for rescission. In overruling this defence the Court said:

"If at the time when a fraud is discovered, which was perpetrated by promoters in a sale to the corporation of property owned by them, the property is no longer in the condition in which it was when the company took it, the company may, keeping the property, sue the promoters for the secret profits which it was their duty not to make without notifying the company thereof." P. 321.

The Court thus put the right to maintain a bill for rescission, and one for the alternative relief, on precisely the same ground.

In the case last cited the bill against the promoters of the East Tennessee Land Company was not filed until almost six years after the transaction complained of.

In *Bagnall* v. *Carlton*, 6 Ch. D. 371, a case to recover a profit made by the promoter, the suit was brought two years after the transaction.

Lydney & Wigpool Iron Ore Co. v. *Bird*, 33 Ch. D. 85, was a similar suit to recover profits made by a promoter. The bill was filed about ten years after the transaction complained of. The Court held that the plaintiff was entitled to recover.

In all of these cases the Court acted on the same principle, — that lapse of time was no bar as long as the suit was brought with reasonable diligence after the facts became known.

See also:

Alger v. *Anderson*, 78 F. R. 729.

In the present case there was no unreasonable delay in bringing suit after the plaintiff became aware of the facts and was free from the domination of the wrongdoers.

From the time of the plaintiff's organization until April 4, 1902, Lewisohn and Bigelow controlled the corporation. They chose directors, most of whom were personal friends, and chose Bigelow continuously to fill the office of president and chief executive officer (Bill, par. Twenty-second, Rec. p. 15). Within a few months after the domination of Bigelow and Lewisohn over the corporation ceased, this suit was brought.

IV

In the alternative, if for any reason the Court deems it improper to grant relief by rescission, the plaintiff is entitled to recover profits.

It is perfectly well settled that where rescission cannot be had, because the property has materially changed in character or for any other reason, the corporation may recover the profits made by the promoters from the obnoxious transaction.

In *Yeiser* v. *U. S. Board & Paper Co.*, 107 F. R. 340, the Court said there could be no rescission without injustice, because the property purchased had been in active use and could not be given up without injury to the corporation; but the Court allowed the recovery of the profit made by the promoters.

In *Chandler* v. *Bacon*, 30 F. R. 538, the Court held that promoters who had negotiated the sale of a patent to a corporation and had by arrangement taken thirty-seven hundred and fifty shares for their services, and had offered other stock to the public for subscription without disclosing this profit, were liable at the option of the corporation to return the shares, to turn over the entire profit made by them from selling the shares, or to pay to the corporation the amount which it had lost by not having the shares to sell.

In *Yale Gas Stove Co.* v. *Wilcox*, 64 Conn. 101, the

Court permitted recovery of the profit, the corporation not desiring to rescind the transaction.

In *Hayward* v. *Leeson*, 176 Mass. 310, the suit was maintained to recover profits, rescission being impossible.

In the case against Bigelow, identical with the present case, the Supreme Judicial Court of Massachusetts held that as alternative relief the profit was recoverable.

> *Old Dominion Copper Mining & Smelting Co.* v. *Bigelow*, 188 Mass. 315, 328, 329.

In *Franey* v. *Warner*, 96 Wis. 222, the Court, in describing the remedies in cases of the class under consideration, said:

> "Or without restoring, he, or all similarly interested joining, may sue in equity to charge such person as a trustee of the profits fraudulently retained by him and for an accounting." P. 235.

This statement was quoted with approval.

> *Hebgen* v. *Koeffler*, 97 Wis. 313, 320.

See also:

> *Burbank* v. *Dennis*, 101 Cal. 90.
> *The Telegraph* v. *Loetscher*, 127 Iowa, 383.
> *Parker* v. *Nickerson*, 112 Mass. 195.
> *South Joplin Land Co.* v. *Case*, 104 Mo. 572.
> *Woodbury Heights Land Co.* v. *Loudenslager*, 55 N. J. Eq. 78; 56 N. J. Eq. 411; 58 N. J. Eq. 556.
> *Spaulding* v. *North Mil. T. S. Co.*, 106 Wis. 481.

Counsel for the appellees argue strenuously that if rescission is for any reason impossible, there is no remedy except in cases where property is sold to a corporation by a person who, when he acquired it, was under a fiduciary obligation to acquire it for that corporation. To allow a recovery of profits made by a sale to the corporation under other circumstances would, it is said, be inadmissible, as amounting to enforcing a new contract at a lower price.

Reliance is placed upon the English cases as establishing a rule that without rescission there can be no recovery of a profit made by a sale in violation of fiduciary duty. Those cases do not establish any such rule.

In *Erlanger* v. *New Sombrero Phosphate Co.*, 3 App. Cas. 1218, recovery of profits was asked as alternative relief. Rescission of the contract was granted. In the House of Lords and in the lower courts the judges did, it is true, doubt the possibility of recovering profits, but the doubt was not necessary to the decision.

In *Re Ambrose Lake Mining Co.*, 14 Ch. D. 390, no recovery was possible because there had been no breach of fiduciary duty. The judges here also apparently doubted the propriety of allowing recovery of profits.

In *Re Cape Breton Co.*, 26 Ch. D. 221; 29 Ch. D. 795, it was held that when a promoter sold to a corporation property acquired by him before there was any duty on his part to the corporation, the sale might, if the facts warranted, be rescinded; but if rescission was not possible there could be no recovery. Lord Justice Bowen in the Court of Appeals dissented on the ground that the right to relief was not limited to rescission, but extended to recovery of whatever profit had been made by the breach of trust. In the House of Lords (*Cavendish Bentinck* v. *Fenn*, 12 App. Cas. 652) the decision below was affirmed on the ground that the acts were not sufficient to warrant relief on any theory.

In *Burland* v. *Earle*, (1902) App. Cas. 83, the Privy Council, in the case of a sale by an officer of a corporation, refused to allow a recovery of profits.

In *Lydney & Wigpool Iron Ore Co.* v. *Bird*, 33 Ch. D. 85, one who joined in promoting a corporation to purchase certain property and received a secret profit by way of commission paid from the purchase price was held liable to restore to the company the amount received, on the ground that it was a profit made by him by the use of his position.

In *Re Olympia, Limited*, (1898) 2 Ch. D. 153, the Court

of Appeals allowed recovery of profits, rescission being impossible. The Master of the Rolls (Lord Lindley) and Lord Justice Collins both pointed out that the House of Lords in the Cape Breton case had not approved the doctrine that rescission was the only remedy.

This decision was affirmed by the House of Lords in *Gluckstein* v. *Barnes*, (1900) A. C. 240, although there was no evidence of any duty on the part of the defendant to acquire the property for the corporation. Recovery of profits was held, in accordance with the dissenting opinion given by Lord Bowen in the Cape Breton Company case above mentioned, to be the appropriate relief where the profits were made by the violation of a fiduciary duty. The case cannot be distinguished on any ground of active misrepresentation or issue of a prospectus, because those facts, while important in fixing the rights of individual stockholders, are immaterial so far as rights of the corporation are concerned.

In *Re Leeds & Hanley Theatres*, (1902) 2 Ch. 809, the Court of Appeals again followed the view expressed by Lord Bowen. A promoting corporation was held accountable to the official liquidator for a profit made on a resale to a corporation promoted by it, which was being wound up. The Court expressly refused to consider whether the defendant was under any fiduciary duty at the time the property or a right to purchase it was acquired, but held that for a breach of its fiduciary duty existing subsequently the defendant was liable, and that the measure of recovery was the profit made by the promoters.

Any other rule than that applied in the case last cited and in the American cases leads to very unfortunate results. If rescission is impossible, although the impossibility results from no fault of the party wronged, recovery is barred. A promoter who has made an exorbitant profit solely by misuse of his position is permitted to retain the whole if he is fortunate or skilful enough to conceal the wrong until it is no longer possible to

rescind, but may be required to restore all if he is found out before rescission has become impossible.

By allowing recovery of profits as an alternative relief no injustice is done to the defendants. A trustee who in violation of his duty makes a secret profit by selling to his beneficiary is held liable because he has obtained the profit by the use of his position, just as he is held liable if he has taken a commission from one with whom he deals in behalf of the corporation.

Archer's Case, (1892) 1 Ch. D. 322.

A promoter is under no obligation to sell to the corporation. He may dispose of his property as he thinks fit; but if he disposes of it to the corporation the law says that he shall not do so in such a manner as to make a secret profit for himself. If, then, the promoter elects to sell to the corporation, he is bound so to conduct the transaction that he shall not make a secret profit, and if he violates this duty it is no injustice to compel him to give up the profit, to compel him to put the transaction on that basis on which alone he had a right to make it.

The adoption of such a rule does not give the corporation any right to play fast and loose. The Court can refuse an account of profits if rescission is practicable and a more just relief; and the corporation will lose the right to any relief by delay. On the other hand, to refuse any relief if rescission is impossible gives the wrongdoer the opportunity to gamble with impunity on the chance of the fraud remaining undiscovered until rescission is impracticable. If discovered in season the contract is rescinded and he loses nothing but his profit, retaking the property to do with it as he pleases; if not discovered in season he retains his profit. It requires a considerable degree of hardihood to contend that a wrongdoer is unjustly treated if upon the discovery of his wrongful act he is deprived of the profit that he has made instead of being given a second chance to make such a profit, especially when the only alternative is to permit him to retain the

profit. These considerations have led the American courts, practically without exception, to hold that an account of profits may be had as alternative relief, and led so distinguished a jurist as Lord Bowen to approve the same rule.

EIGHTH

ALBERT S. BIGELOW IS NOT A NECESSARY PARTY TO THIS SUIT.

I

If the relief sought can be granted without joining persons not within the jurisdiction, such persons need not be joined.

The general rule in equity is that all persons interested in the subject-matter of a suit should be joined as parties. In applying the rule, courts of equity recognize three classes of persons interested in the litigation: first, persons whose interest is such that they may properly be joined; second, persons whose interest is such that, if they are within the jurisdiction of the Court, they must be joined; third, persons whose interest is such that they must be parties to the suit or it cannot proceed.

Barney v. *Baltimore*, 6 Wall. 280.

Failure to join a person whose interest only makes him a proper party is of course not material. And since the requirements as to parties exist and are enforced for the purposes of justice, and not as a mere dogma,

Elmendorf v. *Taylor*, 10 Wheat. 152,

the courts will relax their requirements as far as possible, so as not to insist upon the presence as a party of a person who is interested in the suit, but cannot be brought in for want of jurisdiction over his person, or whose presence would oust the jurisdiction of the Court, if relief can be granted in his absence.

Payne v. *Hook*, 7 Wall. 425, 431.
Union Mill & M. Co. v. *Dangberg*, 81 F. R. 73, 90.
Mackay v. *Gabel*, 117 F. R. 873.

The distinction between persons who must be joined if possible and persons without the joinder of whom the suit cannot proceed is marked. As to the latter the Court said in *Wall* v. *Thomas*, 41 F. R. 620, 621:

"They are indispensable parties if their interest in the subject-matter of the suit, and the relief sought, are such that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience."

The distinction is based upon the power of the Court to make and enforce a proper decree. If the Court cannot make and enforce a decree against the persons who are before the Court without affecting the rights of others who are not before it, then the Court must require the absent parties to be brought in, and the impossibility of doing so does not remove the obstacle to the exercise of jurisdiction. But, if the bill establishes a case entitling the plaintiff to relief against a person who is before the Court, such relief can and should be granted, although there are other persons not before the Court who, to avoid multiplicity of suits or other inconveniences, ought to be joined as parties, if the plaintiff shows that he is unable to bring in those persons as parties because they are not within the jurisdiction of the Court.

Towle v. *Pierce*, 12 Met. 329, was a suit to recover a sum received by the defendant on a settlement of partnership accounts between himself, the plaintiff and two others. The plaintiff alleged that he had received less than his share, and the defendant more by the same amount. The court held that the other two partners, although obviously proper parties in a suit to settle partnership accounts, need not be joined, as they were without the jurisdiction.

II

The relief sought can be granted without affecting any rights of Bigelow, and without injury to the defendants.

1. Wherever relief is granted on a liability that is several, it is unnecessary to join persons who may also be jointly liable with the defendant.

At law joint tortfeasors may be sued separately.

Lovejoy v. *Murray*, 3 Wall. 1.
Luce v. *Dexter*, 135 Mass. 23.

The same principle applies in equity. The fact that other persons against whom, if they were joined, the same relief would be granted are not parties to the suit is no reason for not proceeding against those who are present.

Florence S. M. Co. v. *Grover & B. S. M. Co.*, 110 Mass. 1.

If several unite in a transaction that amounts to a breach of trust, it is no defence to a suit against one of them that the others are not joined. In *Palmer* v. *Stevens*, 100 Mass. 461, 466, the Court said:

"Certainly there can be no ground for contending that, if one of a number, who have jointly committed a fraud, is brought before a court of equity, relief against him is to be denied to the injured party because the others, equally guilty, cannot be made amenable to the process of the court."

Every proceeding seeking relief for a breach of trust or violation of fiduciary duty is based upon a several liability. Each person joining in such a breach of trust is liable *in solido*. The beneficiary may have satisfaction for the full amount which he is entitled to recover from any one of the wrongdoers, and consequently may proceed against any one without joining the rest.

In *Hazard* v. *Durant*, 19 F. R. 471, a suit was brought against trustees, seeking an account and the recovery of

trust funds. The Court held that the suit could be maintained although a part only of the guilty trustees were or could be joined.

A similar decision was rendered in *Trull* v. *Trull*, 13 Allen, 407.

Recovery against promoters, directors, and persons in similar fiduciary positions is upon the same footing. The basis for relief is the wrongful act, the violation of the fiduciary duty. Each of the persons joining in such violation is severally liable. If the relief sought is the recovery of profits, each may be held separately.

In *Hayward* v. *Leeson*, 176 Mass. 310, each of two promoters was sued separately, and a decree entered against each for the amount sought to be recovered. The Court did not limit the right to relief to an account of net profits; the ultimate decree was for the loss caused to the corporation. Nor did the Court base its right to relief on the issue of a prospectus, or on bulk of the money to purchase the property having been obtained by public subscriptions for stock.

In *Old Dominion Copper Mining and Smelting Co.* v. *Bigelow*, 188 Mass. 315, the Court held that "a suit founded on such an equitable tort" could be maintained against one of the two promoters jointly guilty.

In *Fountain Spring Park Co.* v. *Roberts*, 92 Wis. 345, it was held that persons associated with promoters in a plan by which a secret profit was taken upon a sale to the corporation were liable without regard to the amount that they actually received.

In *Woodbury Heights Land Co.* v. *Loudenslager*, 55 N. J. Eq. 78, a suit was maintained to recover profits from one of two promoters.

In *Gluckstein* v. *Barnes*, (1900) A. C. 240, one promoter was held liable for a sum received by him and three others as their share of the profits made by a syndicate which they formed to purchase property and sell it to a company. The other promoters were not before the Court. (1898) 2 Ch. 153.

See also:

Phosphate Sewage Co. v. *Hartmont*, 5 Ch. D. 394.
Bland's Case, (1893) 2 Ch. 612.

If in the present case the Court should grant relief by way of recovery of profits, Bigelow and the present defendants would each be liable for the full amount of the joint profit. No wrong could be done to either by permitting the plaintiff to establish this liability against one of them alone. There can, therefore, be no good reason for any absolute rule requiring both to be joined in one suit.

2. There is nothing peculiar to relief by rescission that prevents the application of this principle.

The relief granted by a court of equity in decreeing the rescission of a contract and the return of the consideration paid is founded on the same liability as a decree for recovery of profits. The decree recognizes the wrong done by the defendant and the consequent right of the plaintiff to avoid the contract, and, because he is entitled to and does avoid it, to recover what he has paid. At law a similar remedy is granted whenever a plaintiff has exercised a right to avoid a sale or other transaction by tendering a return of whatever of value he has received. The distinction is that at law the plaintiff proceeds on the basis of a completed rescission, while in equity he may proceed on the basis of a rescission not completed. In each case the purpose of the proceeding is to obtain restitution of what the plaintiff has paid.

Thomas v. *Beals*, 154 Mass. 51.

It has already been shown that all persons concerned in a transaction such as that now in question are severally as well as jointly liable for the entire amount recoverable by the plaintiff, and may be proceeded against severally as well as jointly. The only difference between a proceeding by which a rescission is decreed and one asking

for a recovery of profits is in the amount that may be recovered. The ground of liability is the same, and the several nature of the liability is the same. If the plaintiff can establish its right to rescission, it is entitled to recover the whole consideration paid by it from the present defendants alone, whether that recovery is in a proceeding to which Bigelow is a party or not. The decree in a suit founded on rescission runs against all who are defendants and are found liable, and may be satisfied by proceeding against any one of them, leaving him to such right of contribution as he may have. Such decrees were entered in

New Sombrero Phosphate Co. v. *Erlanger*, 5 Ch. D. 73, 125.
Lindsay Petroleum Co. v. *Hurd*, L. R. 5 P. C. 221, 231.

Where there are several defendants any one of whom may be required to make the entire repayment called for by the decree, it is obviously just that the decree should provide that the reconveyance by the plaintiff should be made to such one of the defendants as actually makes the repayment.

In *Lindsay Petroleum Co.* v. *Hurd*, L. R. 5 P. C. 221, such was the form of decree entered in the court below (see *Lindsay Petroleum Co.* v. *Hurd*, 16 Grant Ch. Rep. 147, 153), and approved by the Privy Council, the only change on the appeal being to provide for the possibility of the plaintiff corporation having been dissolved.

It appears, therefore, that if Bigelow were a party, the decree entered by the Court would order a repayment to the plaintiff for the whole of which the present defendants would still be liable severally with Bigelow, and for a reconveyance to whichever defendant made such repayment. The only difference between such a decree and the decree prayed for in this suit is that, if Bigelow were a party to this suit, his liability as well as that of the defendants would be established. The present suit asks to establish only the liability of the defendants. As that liability is in any event several, it is not necessary for its establishment that the liability of any other person should

be considered; and as the relief to be granted, so far as the defendants are concerned, and so far as Bigelow is concerned, is not affected in any way by the presence or absence of Bigelow as a party, he cannot be a necessary party.

The real test by which to determine whether or not a person is an indispensable party is whether a decree can be made without affecting that person's rights.

Chadbourne v. *Coe*, 51 F. R. 479.

Judged by this test, Bigelow is not a necessary party. No decree which the Court is asked to make will affect his rights. If the Court orders restitution by the defendants, and a conveyance by the plaintiff to the defendants, no rights of Bigelow are affected. All rights of the corporation against Bigelow will by satisfaction from the defendants be extinguished. If the defendants by satisfying the decree become entitled to a claim against him for contribution, they will be free to pursue their claim, and Bigelow will be no less free to dispute it. They received jointly the entire consideration paid by the plaintiff and as against the plaintiff at least each is liable for the whole.

For these reasons the Courts have never deemed it essential, in order to grant relief by rescission, that every one concerned in the transaction should be a party; they look only to the question whether the result can actually affect those not joined.

In *Ashmead* v. *Colby*, 26 Conn. 287, three individuals conspired to sell to a corporation a mine, practically worthless, title to which stood in the name of one of them. Subsequently a bill to rescind and recover the purchase money was brought. The individual by whom the conveyance was made died a non-resident before the suit was brought, and no personal representatives of him were made parties. The Court, however, granted the relief asked, on the ground that personal representatives of the deceased grantor were not indispensable parties, and that the objection of non-joinder had been waived.

A similar question was involved in *Donovan* v. *Campion*, 85 F. R. 71. The plaintiff there sought to recover property which he had been induced to convey to one Budd, who, it was alleged, was a mere conduit to pass title to the defendant. It was held that Budd, although the person to whom the conveyance was actually made, was not a necessary party.

In *Anthony* v. *Campbell*, 112 F. R. 212, the Boston Safe Deposit and Trust Company, as trustee under a mortgage of certain securities, sold the securities at the instigation of a majority of bondholders to further a plan of reorganization. The Court held that, having before it the purchaser of the securities and the company for whose benefit the sale had been made, it could set aside the sale without the Trust Company being joined as a party, protecting the latter from any effect upon its rights by proper reservation in the decree.

See also:

Gross v. *G. W. Scott Mfg. Co.*, 48 F. R. 35.
Smith v. *Lee*, 77 F. R. 779.

In the present case the plaintiff is entitled to full relief against the defendants. It might prove that for some reason Bigelow was not liable or that he was not able to make restitution. The defendants would, in that event, none the less be bound to make restitution of the full consideration paid by the plaintiff. If in some future proceeding between the defendants and Bigelow the latter should defeat a claim for contribution, the defendants would have suffered nothing, as they could have paid only what would have been recoverable from them if Bigelow had been a party to this suit. And Bigelow will suffer nothing from the decree of the Court in this suit because as against him it will establish nothing.

The only practical ground for saying that Bigelow is a necessary party is the possibility that otherwise perchance the whole liability may be enforced against the present defendants. But a court will never refuse relief

against a wrongdoer because it cannot in the same proceeding establish rights of contribution between several wrongdoers.

This objection to relief has frequently been raised and always been dismissed. In *Gluckstein* v. *Barnes*, (1900) A. C. 240, the Court was asked to direct proceedings against others of the promoters before requiring the defendant to make good the amount recovered against him (consisting of the profits of four out of a greater number of promoters). Lord Macnaghten said:

> "He may or may not be able to recover a contribution from those who joined with him in defrauding the company. He can bring an action at law if he likes. If he hesitates to take that course or takes it and fails, then his only remedy lies in an appeal to that sense of honor which is popularly supposed to exist among robbers of a humbler type." P. 255.

Counsel for the defendants has argued that because there was a joint interest in the sale made by Lewisohn and Bigelow therefore Bigelow must be a party to a rescission. There can be no technical necessity because the contract of sale was in fact made with Lewisohn alone, whatever Bigelow's interest in it may have been.

No case has been cited for the appellees establishing any such absolute rule as to joinder. All of the cases referred to are cases in which the decree would necessarily and actually affect the interests of the persons not before the Court.

In *Shields* v. *Barrow*, 17 How. 130, property was sold and notes given for part of the price, on which six persons were indorsers. A compromise was subsequently made by which certain payments were to be made by the indorsers and all liabilities on the original sale and notes cancelled. The bill was brought against two of the indorsers, the purchaser and the other four indorsers being non-residents, to set aside the compromise and compel payment by the defendants of such of the original notes as fell due. The Court held that there was a fatal lack

of parties. Obviously a rescission of the compromise decreed in the absence of the maker of the original notes could not restore to the indorsers their right of recovery against the maker in case of payment. This consideration alone is enough to show that there was a real absence of necessary parties.

In *Coiron* v. *Millaudon*, 19 How. 113, the mortgagees were held necessary parties to a suit to set aside a foreclosure sale, on the ground that if the sale was set aside they would be liable to refund to the purchaser what they had received.

In *Barney* v. *Baltimore*, 6 Wall. 280, it was held that a partition suit could not be maintained in the absence of one of the joint owners.

Bank v. *Carrollton Railroad*, 11 Wall. 624, was a suit by the assignee of one of three partners to recover a share of the partnership property. The Court held the partners must be joined, as there would have to be an account.

In *Ribon* v. *Railroad Co.*, 16 Wall. 446, it was held that persons who received the proceeds of a foreclosure sale were necessary parties to a suit to set it aside, as they would become liable to refund what they had received.

Williams v. *Bankhead*, 19 Wall. 563, was a bill to recover a specific fund claimed by one who was not joined as a defendant.

In *Bell* v. *Donohoe*, 17 F. R. 710, a stockholder sued in the right of a corporation, not joined, to set aside a transaction between the corporation and two partners, of whom one only was joined. The Court held the corporation and the other partner necessary parties. Obviously the suit was not maintainable in any event without the corporation.

In *Duchess D'Auxy* v. *Porter*, 41 F. R. 68, it was held that to a bill by the executor of a deceased partner for an accounting all the surviving partners were necessary parties.

In *Wall* v. *Thomas*, 41 F. R. 620, the Court refused to enjoin part of a board of trustees from doing acts alleged

to be in breach of trust, because by so doing it would in effect prevent the absent trustees from acting without their having an opportunity to be heard, and might also expose the trustees restrained to proceedings for refusing to join in doing the acts.

In *Chadbourn* v. *Coe*, 45 F. R. 822, it was held that a creditor could not maintain a suit to recover and apply to the satisfaction of his claim, not reduced to judgment, property alleged to have been fraudulently conveyed by his debtor without joining the debtor.

In all of these cases it will be seen that there was a practical objection to the maintenance of the suit in that either the necessary result of a decree would be to create a liability, or produce a situation in which a liability should exist, against absent persons, or the decree would give to a person property claimed by one not a party, or in which one not a party had an adverse interest, or that accounts must be taken affecting the rights of the absent person, or in some similar way the rights of one not a party would necessarily and practically be affected.

No case has been cited in which a suit to rescind a sale or recover profits made by a sale from persons in a fiduciary relation has failed because one or more of those persons could not be joined, or in which an objection of want of parties has in such a case been considered.

In the report of *New Sombrero Phosphate Co.* v. *Erlanger*, 5 Ch. D. 73, 83, it is stated that the defendants' answer submitted that all members of the syndicate should be joined, and that they were accordingly added by amendment, but whether by direction of the Court does not appear. No question as to parties was considered in any of the opinions in any of the courts.

In the present case it has been shown that there is no practical reason why relief cannot justly be given in the absence of Bigelow, just as the Supreme Judicial Court of Massachusetts has held that in the suit there relief can be given against Bigelow in the absence of the present defendants. That decision does not limit the relief to a

recovery of profits. On the contrary, the Court expressly stated that "if the defendant does in fact restore the whole consideration, he will be subrogated to the real estate here in question." 188 Mass. 329.

NINTH

THE BILL IS NOT MULTIFARIOUS.

I

The bill does not join different and inconsistent cases.

The only case set forth in the bill as to which relief is asked is the sale of certain real estate to the plaintiff for the benefit of the defendants' testator and his associate, Bigelow. As to this sale, the plaintiff seeks a rescission or other appropriate relief. The fact that the bill sets forth matters as to connected transactions which might form a ground for relief, and do form the ground for relief asked in another suit, cannot make the present bill multifarious.

See *Old Dominion Copper Mining & Smelting Co.* v. *Bigelow*, 188 Mass. 315.

If under any circumstances such statements could be deemed to afford a basis for relief under the general prayer, and to make the bill multifarious, the express disclaimer in paragraph twenty-sixth of the amended bill obviates any such difficulty.

II

The bill does not ask for different reliefs inconsistent with each other.

The appellees not having appealed from the decree overruling the demurrer based on alleged multifariousness, cannot now rely on that ground.

Landam v. *Jordan*, 203 U. S. 56.

Assuming the objection still to be open it is not well founded.

A plaintiff may always file a bill asking for such relief in the alternative as the Court may determine is appropriate to the facts alleged. He cannot set up inconsistent states of facts and ask for relief according as the one or the other is established, but having stated his case, he may put his prayer in the alternative if in doubt as to the relief to which on the facts he is entitled. Such an alternative prayer does not render the bill multifarious.

Kilgour v. *N. O. Gas Light Co.*, 2 Woods, 144.
Bagot v. *Easton*, 7 Ch. D. 1.
Foulkes v. *Davies*, L. R. 7 Eq. 42.
Stein v. *Robertson*, 30 Ala. 286.

In *Bagot* v. *Easton*, 7 Ch. D. 1, the bill alleged that the plaintiff was induced by the defendant's fraud to enter into a partnership and contribute twenty-four hundred pounds. He prayed for a rescission, and in the alternative, on additional facts alleged as to the defendant's conduct, recovery of the twenty-four hundred pounds or for a dissolution. The Court held that the case was a suitable one to ask alternative relief; that there was no inconsistency in asking such relief; and that it was not a joining of two causes of action.

The relief asked in the present suit is a rescission of the sale and an accounting for the consideration received, or, in the alternative, that the defendant pay the plaintiff the loss suffered by the plaintiff through the wrongful disposition of these shares.

These prayers are entirely consistent. *Old Dominion Copper Mining & Smelting Co.* v. *Bigelow*, 188 Mass. 315. Each rests upon the same state of facts, — the violation by the defendant of his duty to the plaintiff, and the consequent damage suffered. Each affirms the wrongfulness of the acts set forth. The only undetermined point is whether the proper relief for these wrongful acts is by a rescission or by a recovery of damages. A prayer for

alternative relief is only inconsistent when granting one alternative involves denying the facts on which the other alternative is founded. Thus a bill alleging that a will is invalid and asking relief as heir-at-law, and joining an alternative prayer that, if the will be valid, the executor be removed, is bad for asking inconsistent relief.

Colton v. *Ross*, 2 Paige, 396.

The principle as to alternative relief was stated by Vice-Chancellor Page-Wood to be:

"You have no right to allege two inconsistent states of facts and ask relief in the alternative, for the two cannot be true; but you have always a right to state the facts of the case, the documents and deeds, and ask the conclusion of the Court on those facts and documents, and say the Court may come to one conclusion of law or it may come to another; and you may ask the Court to come to a conclusion on the facts which you have disclosed, having stated everything that will enable the Court to form a proper judgment. You may ask the judgment of the Court on two alternatives. That may be done on any bill without objection."

Rawlings v. *Lambert*, 1 Johns. & H. 458, 466.

In the present case, to grant either alternative form of relief asked, the Court must find the same facts.

LOUIS D. BRANDEIS,
WILLIAM H. DUNBAR,
EDWARD F. McCLENNEN,
Of Counsel for Appellant.

March, 1908.

Office Supreme Court, U. S.
FILED
APR 13 1908
JAMES H. McKENNEY,
CLERK.

United States Supreme Court,

OCTOBER TERM, 1907.

No. 206.

IN EQUITY.

THE OLD DOMINION COPPER MINING & SMELTING COMPANY,

Petitioner,

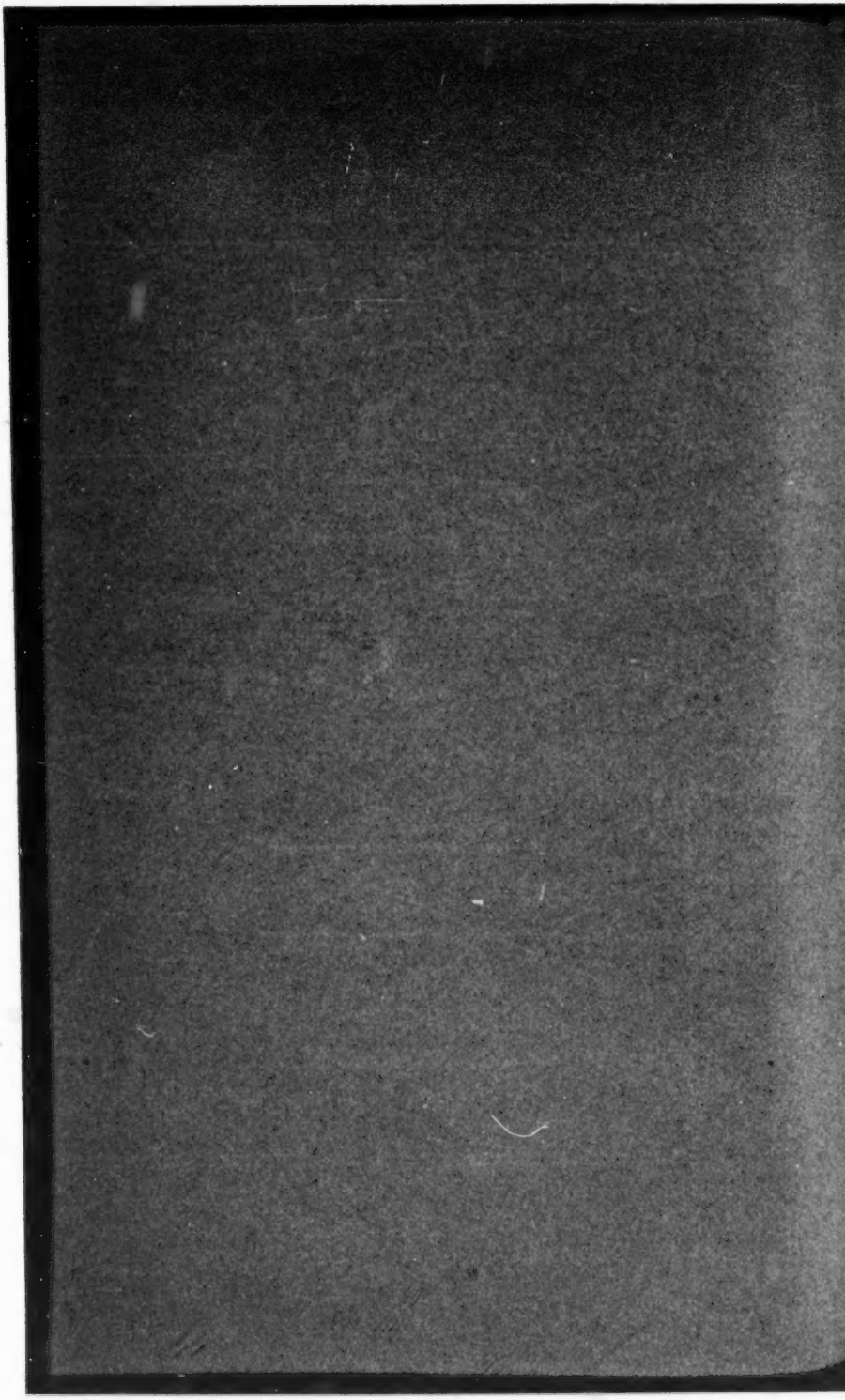
against

FREDERICK LEWISOHN ET AL.,

Respondents.

RESPONDENTS' BRIEF.

EDWARD LAUTERBACH,
EUGENE TREADWELL,
Counsel for Respondents.



Supreme Court of the United States.

THE OLD DOMINION COPPER MINING & SMELTING COMPANY,
Petitioner,

against

FREDERICK LEWISOHN *et al.*,
Respondents.

No. 206.
October, 1907.
In Equity.

RESPONDENTS' BRIEF.

ON CERTIORARI TO THE CIRCUIT COURT FOR THE SECOND CIRCUIT TO REVIEW THE DECISION OF THAT COURT AFFIRMING THE DECREE OF THE CIRCUIT COURT OF THE SOUTHERN DISTRICT OF NEW YORK DISMISSING COMPLAINANT'S BILL ON DEMURRER.

Statement.

The bill of complaint stripped of immaterial allegations, conclusions of law, and mere verbiage, presents a claim concisely stated as follows :

May 27th, 1895, Lewisohn and Bigelow bought all the capital stock of the Baltimore Company owned by the Simpson estate (*fol.* 7), and in June, bought the remaining capital stock of the Baltimore Company owned by Keyser, and also acquired the mining properties held by Keyser for the Baltimore Company (*fol.* 8, p. 5). May 28th, 1895, they gave *their* notes indorsed by Lewisohn Brothers (*fols.* 7–9) for the Simpson stock. In June, 1895, they gave like notes for the Keyser

stock. By July 8th, 1895, all the notes had been paid in full (*fol.* 16). The **Syndicate Associates** *by agreement were to pay* their respective subscriptions (*fol.* 6) as follows: 14 per cent., May 27th; 28 per cent., July 28th; 28 per cent., Aug. 25th, and 28 per cent., Sept. 24th.

July 8, 1895, Lewisohn and Bigelow organized a New Jersey corporation, the complainant (p. 6, Pars. Ninth and Tenth), with an authorized capital stock of 150,000 shares of the par value of $25 each, Lewisohn and Bigelow themselves or through their representatives subscribing for all of the stock necessary to complete the organization of the company, and furnishing it with a board of directors composed of themselves or their representatives in interest. Lewisohn and Bigelow **on July 11th, 1895,** as owners of the capital stock of the Baltimore Company sold and complainant bought (p. 8, Par. Thirteenth) all the property of Baltimore Company, for 100,000 shares of the complainant company's stock. **On the same date** they also sold to, and the company bought, the mining properties above mentioned (Par. Fourteenth), known as the Keyser properties, for 30,000 shares of the company's stock.

Possession of *all* the above-mentioned property was delivered to the **company July 12th, 1895** (pp. 9, 10).

The **associates in the syndicate** *were by agreement* parties to the purposes and transactions of Bigelow and Lewisohn (Pars. Third and Fourth, *fol.* 25) and were by the argeement (p. 4) to get back in cash their respective advances and also to share *pro rata* in *cash* or in stock, with Bigelow and Lewisohn in the profits of the sale of *all of* the properties (*fol.* 25), and in fact were later offered repayment in cash of their advances (p. 12), and *did* receive *profits* in stock of

100 per cent. on their advances (Par. Nineteenth, p. 12), applying the amounts of their respective advances to the purchase of additional stock from Lewisohn and Bigelow personally. At the time of these transactions Lewisohn and Bigelow were directors of the complainant company and (Par. Eleventh), together with their representatives, constituted the entire board of the company, and owned the entire issue of stock of the company, holding the same either in their own name or in the name of representatives wholly under their control. Thereafter **on July 18th, 1895,** the company, still under the control of Lewisohn and Bigelow as its directors, was caused by them to *offer* to the public at *par* for cash (p. 9, *fol.* 15), 20,000 additional shares of capital stock, the remainder of the authorized capital stock of the company. The time when this stock was *subscribed* for is not specified as any earlier date than September 18th, 1895. It is further alleged that the mining properties acquired by Lewisohn and Bigelow from the Baltimore company did not cost Lewisohn and Bigelow more than, or were not fairly worth more than, $1,000,000 (*fol.* 18), and that the mining properties acquired by Lewisohn and Bigelow from Keyser cost Lewisohn and Bigelow nothing and were not fairly worth more than $5,000 (*fol.* 18). The bill also alleges that the shares of the complainant company so exchanged for the property and so sold for cash as above mentioned were, at the time, *of the fair market value of $25 each* (*fol.* 20), *and continued for a long time thereafter to be of such or greater value; but no other property of any kind is claimed ever to have been acquired by the company.* The complaint also alleges that no disclosure was made at any time either to their associates in the syndicate or to any of the purchasers or subscribers for the

remaining 20,000 shares additional stock (p. 10, *fol.* 18, p. 11), or to any purchasers thereof from them, of *the extent* of profit made by Lewisohn and Bigelow in the transfer to the complainant company of the properties above mentioned.

The complaint contains an offer of retransfer of the Keyser properties to the defendants (p. 16, *fols.* 29, 30), and prays for a rescission (*fol.* 30) of the sale of the Keyser properties and a return to the company of the 30,000 shares issued therefor, or in the alternative, the damages suffered by the complainant company.

Albert S. Bigelow is not made a party to the bill.

The foregoing constitute the pertinent allegations of the bill of complaint.

The cause came on for hearing upon the original bill of complaint and demurrer at the February Term, 1905, of the Circuit Court and the bill was dismissed by Judge Lacombe for want of equity (136 Fed. R., 915).

Leave to amend was had and complainant filed the present amended bill, in which numerous changes appeared, without changing the allegations contained in the original bill.

Defendants thereupon again demurred.

The first demurrer is that the bill is without equity and that it is also multifarious, in that it sets forth different and distinct causes which are inconsistent and cannot properly be joined and prays for reliefs inconsistent with each other, and is altogether multifarious.

The second demurrer is to so much of the bill as seeks to have rescission, and is based upon two grounds:

(1) That the bill does not state a case entitling complainant to rescission.

(2) That the bill on its face shows that Albert S. Bigelow is an indispensable party to a bill for rescission, *and that he is not made a party to the bill.*

Complainant's counsel on the argument of the demurrer at Circuit, to avoid the effect of the prior decision by Judge Lacombe, contended that amendment to the bill had changed the cause of action.

Complainant's counsel asserted that the allegations as set forth in the old bill of complaint permitted the conclusion to be drawn *that Bigelow* and *Lewisohn themselves*, and *not the company* caused by Bigelow and Lewisohn, obtained the subscriptions to 20,000 shares of the capital stock of the company for working capital

PLAIN LANGUAGE IN THE PREVIOUS BILL PRECLUDED ANY SUCH CONSTRUCTION.

Fifteenth Para., p. 9.
Para. Twenty-first, at p. 14, *fol.* 24.

The Circuit Court, HOLT, J., upon the argument, intimated that unless the original bill had been so amended as to present a substantially different cause of action, the decision of Judge LACOMBE would be followed, and later held (p. 23) the amended bill to be the same as the original bill and sustained the demurrer for want of equity on the authority of the decision by LACOMBE, J.

The case in the Massachusetts Supreme Court, 188 Mass., 315, against Bigelow will be considered later in this brief (p. 40, *post*).

No creditors interest is involved. No question as to unpaid stock is raised by the complaint or by petitioner in argument or cases cited.

No misrepresentation is alleged.

THE SOLE FAULT CHARGED IS NON-DISCLOSURE OF PROFIT.

Petitioner (Brief, Statement of Facts, p. 3) purports to state the substance of a decision of a single Justice of the Supreme Judicial Court of Massachusetts upon the merits. If such statement is warranted in the brief, we should, on the part of respondent, refer to a *later* suit, in Chancery of New Jersey, brought by Bigelow against the company to enjoin the further prosecution of the Massachusetts suits, wherein the affidavits filed show that the company and its stockholders had, prior to the bringing of the present suits, disposed of all, if any, interest in the claims herein asserted, and in all, if any, recovery thereon, a trust having been created to prosecute the claims, and separate certificates of fractional interest in any ultimate recovery having been issued under such trust and on sale in the Boston stock market at prices varying from thirty cents to three dollars, in which certificates neither the company nor the stockholders as such had any longer any interest or title, although the suit is brought in the name of the company under the trust. The price of three dollars per share was the price current after the rendition of the decision by the single Justice. The New Jersey Chancellor refused to modify his preliminary injunction after hearing motion for such modification, and upon the return day, and after further and full hearing, on March 17, 1908, made the injunction permanent until the further order of the Court.

The New Jersey suit is important as disposing of the *assumed protection* of *pretended* interests of associates and of subscribers, none of whom are complaining, and also as showing the real parties in interest to be speculators masking in the guise of the corporation.

ANALYSIS OF CASE.

FIRST.

There was no fraud upon the company.

I.

The sale by the directors was made with the acquiescence of all concerned, and not by promoters in any sense upon which liability to the corporation or subsequent subscribers could be predicated (*post*, pp. 11, 64).

II.

THE SALE WAS MADE VALID BY THE CONSCIOUS ACQUIESCENCE OF ALL PERSONS INTERESTED IN THE COMPANY.

1. All the persons who joined in the enterprise acquiesced in the transaction.

The **syndicate members** stood in the shoes of the directors and were not persons to whom disclosure was necessary, being equally with the directors **sellers** to the company and **sharing** in the **profits** of the sale (pp. 19–25).

2. Besides those acquiescing, no others joined as part of the original plan or enterprise.

(*a*) The persons who subscribed for the 20,000 shares issued for cash did not join as part of the original plan or of any plan or enterprise, nothing being stated in the bill of complaint to show either information offered to them or any knowledge on their part of any plan or enterprise (pp. 25–32).

(*b*) The enterprise joined in by the subscribers for the 20,000 shares was the enterprise as it **then existed,** namely, a corporation offering 20,000 shares at *par* for cash **without statement or inducement** of any kind (p. 30).

III.

DISCLOSURE TO THE SUBSCRIBERS WAS NOT REQUIRED.

The subscribers to the 20,000 shares were simply **vendees** to whom the vendor (company) stood in no fiduciary relation, no statement being offered **or questions asked** (*post*, pp. 32–34).

SECOND.

Lewisohn or Bigelow were not liable as promoters.

Lewisohn or Bigelow not being liable as promoters, the plaintiff corporation is not entitled to a rescission of the sale or a return of the consideration, or to an account of profits made by the sale (p. 65).

THIRD.

Rescission is the only relief for failure to disclose, without misrepresentation.

I.—If the sale had been made by Bigelow and Lewisohn without full knowledge and assent of all

parties interested and without disclosure of profit, rescission and return of the consideration would be the sole relief permissible, and only then where both of them were parties to the suit (p. 77).

II.—No alternative relief can be granted, the property having been purchased with private means and exchanged for the shares of the company without misrepresentation.

FOURTH.

Albert S. Bigelow is an indispensable party to this suit.

I.—The bill is for a rescission (p. 85).

II.—The relief sought cannot be granted without affecting the rights of Bigelow.

III.—Relief for rescission may not be granted on a several liability where the transfer was joint, as in the present case.

FIFTH.

Rescission of part of the transaction is not permissible.

I.—The property was all acquired in one transaction (p. 90).

II.—The company cannot keep part and return part.

SIXTH.

The bill is multifarious.

I.—The bill asks for different reliefs inconsistent with each other (p. 91).

The request for damages as for a tort is inconsistent with request for rescission. The former treats the transaction as **valid,** but requires damages; the latter treats the transaction as **invalid** and requires its rescission.

FIRST POINT.

The Company is without equity in the premises.

I.

THERE WAS NO FRAUD UPON THE COMPANY.

The Bill alleges that at the date of the transaction sought to be rescinded Bigelow and Lewisohn owned *all the stock* of the complainant, constituted *the entire stockholding interest* of the company and received all of the stock of the company issued, including the stock issued by the complainant for the property in question.

Record, p. 6, *fols.* 11, 12, p. 7, *fol.* 13, p. 14, *fol.* 24.

UNDER SUCH CIRCUMSTANCES THERE WAS NO ONE WHO COULD IN EQUITY COMPLAIN.

AUTHORITIES IN SUPPORT OF THE RULE.

1. Federal Courts.

Foster vs. *Seymour*, 23 Fed. Rep., 65; C. C. S., Dist. of N. Y.

McCracken vs. *Robison*, 57 Fed. Rep., 375; C. C. A., Second Circuit.

Stewart vs. *St. Louis, &c., R. Co.*, 41 Fed. Rep., 736, 738; C. C. D., Kansas.

DuPont vs. *Tilden*, 42 Fed. Rep., 87; C. C. N. D., Illinois.

Wood vs. *Corry Water Works*, 44 Fed. R., 146, 149, Pennsylvania.

Fort Madison Bank vs. *Alden*, 129 U. S., 373, 378.

2. State Courts.

New York. *Barr et al.* vs. *N. Y., L. E. & W. R. R. Co. et al.*, 125 N. Y., 263, 273.
Seymour vs. *Spring Forest Asso.*, 144 N. Y., 333.
Thornton vs. *Wabash Ry. Co.*, 81 N. Y., 462, 467.
Parsons vs. *Hayes*, 14 Abb. N. C., 419, 434.
King vs. *Barnes*, 109 N. Y., 267, 268.
Insurance Press vs. *Montauk Wire Co.*, 103 App. Div., 472 N. Y.
Blum vs. *Whitney*, 185 N. Y., 232.

Illinois. *Higgins* vs. *Lansingh*, 154 Ill., 301, 331, 336.

Wisconsin. *Spaulding and ano.* vs. *North Milwaukee Town Site Co.*, 106 Wis., 481, 488, 489.

California. *Garretson* vs. *Pacific Crude Oil Co.*, 146 Cal., 184.

Kansas. *St. L. F. S. & W. R. Co.* vs. *Tiernan*, 37 Kansas, 606, 633.
Walburne vs. *Chenault*, 43 Kansas, 356, 361.

Colo. *Arkansas, &c., Co.* vs. *Farmers, &c., Co.*, 13 Colo., 587.

Maryland. *Tompkins* vs. *Sperry Jones*, 96 Md., 560, 583.
Swift vs. *Smith*, 65 Md., 428, 435.

W. Virginia. *Merchants & M. S. B.* vs. *Belington C. & I. Co.*, 41 S. Eastern R., 390, 398.

Iowa. *Clark* vs. *American Coal Co.*, 17 L. R. A., 557, 561; 86 Iowa, 456; 53 N. W., 291.

Tennessee. *Divine* vs. *U. S. M. M. & Co.*, 38 South West. R., 93, 98.

3. English Cases.

In re Ambrose, L. R., 14 Ch. D., 390, 395, 396, 397, 399.
In re British Seamless Paper Co., L. R., 17 Ch. D., 467.
Salomon vs. *Salomon*, L. R. (1897) A. C., 22.

4. Text Writers.

Cook on Corporations, 5th Ed., § 46, pp. 125, 135; § 47, p. 139, § 649, pp. 1461, 1462.
Morawetz on Private Corporations, 2nd Ed., Vol. I, § 290.
Pomeroy on Equity Jurisprudence 3rd Ed., Vol. 3, § 1092, p. 2116.

In *Old Dominion Copper M. Co.* vs. *Lewisohn et al.*, *supra*, the Circuit Court, by LACOMBE, J., held that there was no fraud, citing *Foster* vs. *Seymour* and *McCracken* vs. *Robison*, *supra*.

In *Foster* vs. *Seymour*, *supra*, WALLACE, J., says (p. 66):

"There was no fraud upon the corporation. At the time the scrip was exchanged for the mining property, the trustees were all there was of the corporation. There were no stockholders, unless they were stockholders. What was done was done by the corporation. By the exchange the corporation got the mining property, and gave it back again to those from whom it got it, divided into 100,000 shares of the nominal value of $100 each (*The Ambrose Lake Tin & Copper Mining Co.* (*Ex parte Taylor*), L. R., 14 Ch. Div., 390; *re Seamless Box Co.*, L. R., 17 Ch. Div., 467)."

In *McCracken* vs. *Robison*, *supra*, the opinion

of the Circuit Court of Appeals, by WALLACE, J., in describing a similar situation, states at page 377:

"While directors in name they were principals in fact."

And later in the opinion condemns the defendants in the case for having built up a theory

"by confounding names with things and forms with substance."

In *Stewart* vs. *St. Louis, etc., R. Co., supra*, the Court, at page 738, says:

"All parties—directors and stockholders—assented to it; and surely, *subsequent purchasers of stock*, or the *corporation* itself, cannot now object to it (1 Mor. Priv. Corp., 290). It is true the vendors got a very large advance on the price they paid, but that is not alone the test by which the *bona fides* of the transaction is to be tried (*Id.*, 293). * * * As before remarked, parties taking stock afterwards in the company cannot complain of the purchase. The records of the company showed the transaction. It was not kept a secret. *There was no law compelling any person or municipality to take stock in the company unless they voluntarily chose to do so; and if they were deceived by the misrepresentations of the officers, their cause of action rests on that deception and not on an attack on the original contract of purchase*" (italics ours).

In re Ambrose, supra, JAMES, L. J., says on page 395:

"In my view the company only gave back in substance that which it was getting, and *the fraud* was *not between the vendors and the company*, the purchasers, but was a thing calculated to delude people into believing that the shares when got were something more valuable than they really were. * * *

What was taken back was the very thing that

was given in exchange for it, calling it by different names and dividing it into different shares" (italics ours).

BRETT, L. J., says, on pages 396–397 :

"The people who were representing this farce did not deceive themselves, nor were the *people supposed to be buying* nor the people supposed to be selling *deceived.* Is there any deception at all? *The whole was done by the same people; there was nobody in the limits of the company who was deceived in the least*" (italics ours).

COTTON, L. J., on page 399, says :

"*The remedy is a remedy of each purchaser of shares, if there were any such, who was deceived by the representations made by his vendor as to the constitution of the company*" (italics ours).

In re British Seamless Pape. Co., supra, follows the rule both in the judgment and in the main body of the opinions. This case is cited by petitioner upon *dicta* in the opinions rendered therein, to the effect that an immediate issue of cash stock *accompanied with a prospectus* would have altered the judgment (pp. 474, 479). The specified requirement of a *prospectus* is significant. Any prospectus *calculated to deceive* subscribers would involve either actual misrepresentation, or concealment tending to create a false impression which would amount to misrepresentation. Such prospectus was necessary to the perpetration of fraud. *The absence of any prospectus in the present case, therefore, excludes fraud.* The case cited thus becomes especially important in establishing the status of the subsequent *subscribers* as *vendees* from the *company vendor without statement* on the part of the vendor *or inquiry* on the part of the vendee.

In *Barr et al.* vs. *N. Y., L. E. & W. R. R. Co.*

et al., supra, the N. Y. Court of Appeals, at page 273, said:

"We may concede that the contract was voidable, as a scheme concocted by the directors for sharing in the profits of construction; but the difficulty is that all the members of the corporation were assenting to it. There was, therefore, in fact, no fraud practiced upon the company. Practically, the promoters of the corporation in this way placed a valuation upon the corporate properties and franchises, which the contribution and expenditure of their money created; and the fact that they were created for an *expenditure less* than *the par value* of the *aggregate issues* of capital stock and bonds does *not affect* the question at all" (italics ours).

In *Seymour* vs. *Spring Forest Cemetery Association et al., supra*, the same Court says, at page 340:

"While the technical form of this transaction was a sale by the eleven to the corporation, its substance was merely a change in the manner of holding. *The sellers were the buyers.* * * * *Whatever the price it wronged no one and could wrong no one.* * * * *No doctrine as to the dealing of a fiduciary agent with the property of his principal has any application to such a transfer as was made*" (italics ours).

In *Blum* vs. *Whitney et al., supra*, the New York Court of Appeals has reiterated the rule, citing the foregoing cases, including the decision of Judge Lacombe in the present case. The action was brought by the plaintiff as a stockholder of the Distilling Company of America, a New Jersey corporation, on behalf of himself and all other stockholders, after the refusal of the company to sue.

The defendants Whitney and others, owners of stock in certain distilling companies known as the "Constituent" companies, formed a syndicate

which, by agreement, was to receive the stock of other shareholders of such "Constituent" companies, and to transfer all the stock together with a sum in cash to be raised by them, to a corporation to be known as the Distilling Company of America, to be organized by the defendants with an *authorized* capital stock of $125,000,000. Of this *authorized* issue, $67,500,000 was to be issued for the stocks of the "Constituent" companies and the cash, leaving $57,500,000 *unissued stock for future* purposes. The defendants organized the Distilling Company of America with the above-mentioned *authorized* capital, themselves becoming its directors and constituting the entire board thereof, transferred the stocks of the "Constituent" companies owned by them or deposited with them together with the required cash, and caused the Distilling Company *to issue* to them in return $77,500,000 of the capital stock of the company, *the entire issued* stock thereof. There remained, therefore, of the authorized issue of the Distilling Company, $47,500,000 *unissued*. The complaint, among other allegations similar to those in the present action, contained a like allegation that the defendants, without the knowledge and consent of the depositing stockholders of the "Constituent" companies, or of the Distilling Company of America, or of its stockholders, *appropriated* to themselves a large amount of the *stock* of the Distilling Company *without paying* any consideration therefor and *without revealing* to anyone *that they intended* to make any profit or that *they did make a profit* in the transaction (Court of Appeals Cases and Points, N. Y. Law Institute Library, 1906, Vol. 2[illegible]4, p. 21, *fol.* 81). The relief asked for was that the defendants account for the secret profit made by them or the proceeds thereof and for general relief. Defendants demurred to the complaint for want of

sufficient cause of action. The opinion of the Court in sustaining the demurrer rests entirely upon the principle followed by Judge Lacombe in the present case, with full discussion and even additional emphasis. *The opinion, at page 242, also refers to the law governing promoters, which it holds has no application.* It is further to be noted that the attention of the Court of Appeals was called to the Massachusetts case *Old Dominion Copper Mining & Smelting Co. against Bigelow.*

N. Y. Court of Appeals Cases and Points, N. Y. Law Institute Library, 1906, Vol. 2304. Case, p. 334. Appellant's Brief, pp. 9, 12, 15, 40, 68. Respondent's Brief, Def'dt Whitney, pp. 40, 43, 99, 102.

II.

The Corporation.

The company was not injured by the exchange on July 11th, 1895, for property duly received, of 130,000 of the 150,000 authorized shares of the capital stock, in the absence of any cash capital or other shares outstanding, either issued, contracted for or offered.

The company was not injured by the subsequent offer for sale on July 18th, 1895, of the remaining 20,000 shares of its authorized capital stock at par for cash, as it duly received and always retained the entire amount, $500,000, in cash, no part ever going to Lewisohn or Bigelow in any form.

THE COMPANY, THEREFORE, SUFFERED NO INJURY.

III.

The Syndicate Associates.

1. Petitioner rests a claim upon the rights of members of the syndicate other than Lewisohn or Bigelow.

The entire stock alleged in the complaint to have been received by the syndicate was 80,000 shares (Record, p. 12, Par. Nineteenth). Of this one-half or 40,000 shares *was bonus* or *profit* (*ibid*). The other half or 40,000 shares was *sold to* syndicate at $25 per share *by Bigelow and Lewisohn*, not by the company (*ibid*), it devolving upon Lewisohn and Bigelow to dispose of enough stock to raise the cash needed to repay the syndicate advances; but Lewisohn and Bigelow gave their associates the chance to purchase this stock with their advances, which privilege they accepted.

Thus the entire stock alleged in the complaint to have been received by the syndicate associates was either received as profit *eo nomine*, or *bought* from Bigelow and Lewisohn, out of their stock, and was not bought from the company.

2. The Massachusetts Court, in the *Bigelow* case, *includes* the members of the syndicate as *stockholders* who were *defrauded*.

Old Dom. M. & S. Co. vs. *Bigelow*,
188 Mass., pp. 326, 328.

The Massachusetts Court says, at page 323, that no disclosure was made to the syndicate. The bill avers participation by the associates in the plan to secure a large profit (p. 4). Disclosure to the syndicate of a profit of 100 per cent. or 40,000 shares, is conceded by the complaint (p. 4, Par. Fourth; p. 9, Par. Nineteenth; p. 12, *fol.* 21).

The bill also states that the syndicate members

themselves participated in *the profits* of the entire sale of property inclusive of the mining claims, the subject of the present suit (Record, p. 4, *fol.* 6 ; p. 14, *fols.* 24, 25).

3. No cause of action in the right of an associate based upon secret profits can arise where the associates *themselves not only shared* but *covenanted to share* in those profits as alleged in the present case (p. 4, *fol.* 6),

"it was understood *and agreed* between the members of said syndicate and said Leonard Lewisohn and Bigelow that * * * *and that the members of said syndicate should receive in cash or in stock of the new corporation to be formed to purchase said property as aforesaid the profit made by such sale to a new corporation pro rata according to their several subscriptions or interests.*"

See p. 12, (*fol.* 21) :

"and said syndicate thereby made a profit of not less than one million ($1,000,000) dollars."

See also p. 14, *fols.* 24, 25, as follows :

"and all of said action was taken * * * to enable said Leonard Lewisohn and said Bigelow *and such persons as they had associated with them to make a large profit* by the sale of said property of the Baltimore Old Dominion Company, *and of said mining claims and real estate* to the complainant corporation."

No complaint can be made on behalf of receivers of the *bonus* or profit stock.

Cook on Corps., 5th Ed., § 730, page 1848, says :

"If the complaining stockholder participated in the act complained of, he, *of course*, is barred of his remedy."

In *Brown* vs. *Duluth, N. & N. Ry. Co.*, 53 Fed. R., 889, NELSON, J., says, page 892:

"He cannot bring suit on behalf of the other stockholders against the corporation or other parties participating in the issue as his own title is tainted with *the same fraud*" (italics ours).

The authorities are innumerable which deny relief to the *holders* of tainted stock.

The Court, in *Arkansas R. L. T. & C. Co.* vs. *Farmers Loan & Trust Co. et al.*, 13 Col., 587, in relation to the equities of a similar class of persons, says (p. 604):

"Counsel for plaintiff in error states in his brief that the court below dismissed the bill because *ex turpi causa non oritur actio*. The maxim was well and aptly applied. The judgment should be affirmed."

4. No cause of action in favor of the syndicate members can be based on stock (the other 40,000 shares) which they bought from Bigelow and Lewisohn, not from the company. The syndicate took this stock subject to all disabilities of Bigelow and Lewisohn.

Brown vs. *Duluth N. & N. R. Co.*, 53 Fed. R., 889, 892.
Kent vs. *Quicksilver Mining Co.*, 78 N. Y., 159, 188.
Parsons vs. *Hays*, 14 Abb. N. C., 419, 433.
Cook on Corps., 5th Ed., § 735, p. 1883.
Petitioner's Brief, p. 49.
188 Mass., 315, 323.

5. THE SYNDICATE STOOD IN THE SAME RELATION TO THE COMPANY AS BIGELOW AND LEWISOHN.

They were all sellers to (themselves) the company.

Blum vs. *Whitney*, 185 N. Y., 232.

The opinion of the N. Y. Court of Appeals, on p. 241, contains the following :

" The stockholders of the constituent companies (syndicate members) and the individual defendants were the *organizers* of the corporation and *became its first stockholders ; they dealt wholly between themselves as sellers and buyers, organizers and corporation ;* no other persons had any interest in this initial transaction ; *if fraud had been practiced by any one of the organizers upon those associated with him, the cause of action would have vested in the party injured*" (italics and bracketed words ours).

We submit that the view taken by the Court in *Blum* vs. *Whitney* is right and the view to be taken in the present case.

The present company, while frequently alleging that the syndicate were ignorant of the profits taken by Bigelow and Lewisohn, does not allege that they would not have bought from Bigelow and Lewisohn if they had had such knowledge. The presumption is to the contrary from the universal acceptance by the syndicate members.

SYNDICATE MEMBERS ARE NOT COMPLAINING.

Years after and *in face* of *practical* construction by *actual* performance and *sharing* in the benefits, *new parties* may not be allowed to come in with *new interpretations*, thus affording opportunity for *speculative suits* intended *to benefit such new parties alone*, and from which the *original parties cannot* by any possibility derive *benefit.*

The allegations, are, therefore, wholly irrelevant, as no cause or claim of the syndicate or of any of its

members could enure to the company; all claims of the members of the syndicate could only be between themselves, on the one hand, and Bigelow and Lewisohn on the other.

THE REMEDY FOR ANY FRAUD UPON THE SYNDICATE ASSOCIATES IS BY SUIT BROUGHT BY THEM INDIVIDUALLY.

Getty vs. *Devlin*, 54 N. Y., 403, followed in *Franey* vs. *Warner*, 96 Wis., 222, 236; *Burbank* vs. *Dennis*, 101 Cal., 90, 102.

Lake Ontario R. R. Co. vs. *Curtis*, 80 N. Y., 222.

Thornton vs. *Wabash Ry. Co.*, 81 N. Y., 462, 467.

M. V. Co. vs. *Bradley*, 181 N. Y., 152.

THE SYNDICATE AGREEMENT AFFORDS NO BASIS OF CLAIM ON THE PART OF THE COMPANY.

This precise question has been settled in important and well considered cases, where similar contracts were involved, the Court holding adversely to the company's title.

Hutchinson vs. *Simpson*, 92 App. Div. N. Y., 382.

Blum vs. *Whitney*, 185 N. Y., 232, 241.

In *Blum* vs. *Whitney* the fraudulent profit was alleged to be $7,750,000 (Ct. of Appeals Cases and Points N. Y. Law Inst. Lib., Vol. 2304, § 19, *fol.* 76). The profit was alleged to result from *turning in less property* than agreed upon and *taking more stock* for one property owned by defendants than properly assignable thereto.

The N. Y. Court of Appeals, in *Blum* vs *Whitney*, and the Appellate Division in *Hutchinson* vs. *Simpson*, both denied *to the company* any right arising from the syndicate contract upon *the common ground*, namely, that there was no relation of *subscribers* to the corporation, the N. Y. Court of Appeals specifically holding that the *law of promoters did not apply to the case* (185 N. Y., 242).

Petitioner offers only a single authority in opposition, *Arnold* vs. *Searing*, 67 A. T. L. Rep., 832. The case cited was a decision by the Vice-Chancellor and related to an obviously different situation. The syndicate members by the agreement had "syndicate shares" entitling them to receive securities of the corporation to be formed in exchange for their investment, not as in the present case repayment in cash from the syndicate managers. Furthermore, the cost of the property to be purchased was fraudulently overstated and the excess was misappropriated. The syndicate members, therefore, were not partners or associates with managers as in the present case, but were parties furnishing the funds with which the properties were to be acquired and expected to take the securities of the company in return. Thus the case was one where the law governing promoters was applicable such as the cases cited *post*, brief, p. 64 (1), p. 65 (3).

Unless the case is thus distinguishable, by reason of its peculiar facts, from the cases of *Blum* vs. *Whitney*, *Hutchinson* vs. *Simpson*, *Getty* vs. *Devlin*, and other cases cited *ante*, it is not to be relied upon as an authority.

So distinguished, the opinion wherein it refers to the effect of the assent of all parties interested is in accord with the Circuit Court of Appeals in the present case.

THE SYNDICATE AGREEMENT WAS WHOLLY BETWEEN THE PARTIES THERETO.

The reference in the complaint (*fol.* 21) to a few instances does not show a dealing by the company with *subscribers*. No authority to the company therefore is alleged. It doubtless was a bookkeeping matter, where the company in offset of moneys due Bigelow and Lewisohn, paid the cash direct on order of the latter. It is not claimed that the paragraph creates any other or different interests than *those* of the *syndicate members*, or that by the allegations in *folio* 21, to the effect that "Lewisohn and said Bigelow caused the complainant corporation to pay such amount in cash from the funds of the complainant corporation," *any new* or *other interest* or relation was created.

IV.

The 20,000 Shares.

1. The offer by the company of the 20,000 shares was not made or even suggested to the public *until after* the company had *acquired* the property from the syndicate in exchange for the 130,000 shares *and had been put in possession* (Record, pp. 8, 9).

2. The subscribers to the 20,000 shares paid their money for the right to *participate* in such assets as the company *possessed at the time* they were *invited* to *subscribe*.

Petitioner in the brief (p. 37 and elsewhere), to confer upon the subscribers the rights of beneficiaries, would postpone the sale of the property to the dateof September 18th, 1895, when the certificates of stock were issued.

For this purpose, petitioner contends that the transaction was not completed when the property was sold and possession delivered, but only when the certificates were finally issued.

The fault of the contention is plain. It does not square with the allegations of the complaint.

On September 18th, 1895, the directors did nothing more than to confer the formal authority upon the officers of the company to prepare and issue the certificates to the *nominees* of Bigelow and Lewisohn.

The complaint shows that prior to that date every substantial step in the transaction had been taken; the offers of the properties had been made in writing; acceptance thereof and the issuance of stock therefor had been voted by the directors; both of these actions took place on July 11th. These alone might be said to have closed the transaction, but they were followed by delivery of possession of all of the property to the company on July 12th (Record, pp. 9 and 10, par. 16). This finally completed the transaction.

Bigelow and Lewisohn then were stockholders of the company to the extent of 130,000 shares under every rule of law or authority pertinent. Certificates were not necessary to their ownership of the shares.

Certificates, as the name implies, are not stock but merely evidence of ownership of shares.

Van Allen vs. *The Assessors*, 3 Wall., 573, 598.
Hubbell vs. *Drexel & Co.*, 11 Fed. Rep., 115, 118.
Cook on Corporations, 5th Ed., § 13, pp. 49, 50.

If the certificates had never been authorized to be issued, the ownership of Bigelow and Lewisohn of

the 130,000 shares would have been full, complete and absolute, and any disposition by them of any or all of the shares would have been valid, carrying with it all the rights of stockholders of 130,000 shares of the company.

Case vs. *Bank*, 100 U. S., 446.
National Bank vs. *Watsontown Bank*, 105 U. S., 217.
Hussey vs. *M. & M. Bank*, 10 Pickering, 414, 422.

The company, on the other hand, was the owner of the properties and entitled to all formal evidences of title.

Ownership had passed, in the property to the company, and in the stock to Bigelow and Lewisohn. No adverse interest could intervene.

Delay in issuing certificates incident to engraving and facilitating both holders, desiring to have the stock issued to their nominees, and the company avoiding subsequent reissue, is usual and almost always occurs.

No cause is assigned in the complaint why any other than the usual situation should exist. The complaint contains no intimation of any reservation of right on the part of either party to the transaction.

Mutual consent of the parties could not have changed the transaction after the company had offered stock to others on July 18th.

The resolution of September referred to in the complaint was the usual authority from the directors to the officers of the company to issue the certificates to the persons designated, and was the *vendors disposition* of the certificates at the time and not the disposition of the company.

Petitioner's contention is inconsistent with complainant's position in the present suit. While pe-

titioner's desire now is evident to include everything occurring from or before May 4th, 1895, the date of the purchase by Lewisohn of the Simpson option, down to September, 1895, as one transaction, complainant, in bringing its suits, sought in the one to rescind and in the other suit to retain and recover profits, thus necessarily separating the transactions. The separate positions deliberately chosen by complainant in bringing separate suits is inconsistent with faith in the lately adopted contention. It was not made before the Circuit Court or before the Circuit Court of Appeals until the filing of Appellant's Brief in reply. It, however, brings out sharply the want of connection between the subscribers and the previous transaction, and consequently the absence of any fiduciary relation.

3. The subscribers' money always remained with the company. No part of it went to Bigelow or Lewisohn in any form.

4. That they received *full value* for their subscription is shown by the statement in the bill that the shares of stock of the company *were at the time and for a long time thereafter* of the fair market value of $25 a share, the price paid by them (Record, p. 11, *fol.* 20) and even *of greater value.*

The statement of value elsewhere given in the complaint is the mere opinion of the pleader and is irrelevant.

Market value of the property in view of its nature can have no relevancy.

In re Cape Breton Co., 29 Ch. D., 795, the Court, per COTTON, J., says (p. 805):

"Here the property is one for which there is no market price."

In *Gamble* vs. *Queens Co. Water Co.*, 123 N. Y., 91, the Court says (p. 104):

"The true question is what is the value to the Company."

In *Lagunas Nitrate Co.* vs. *Lagunas Syndicate*, 1899, 2 Ch., 392, the Court says (p. 410):

"The property, from its nature, was of necessity of a speculative kind. * * * "

And at page 411:

"The proper way of considering the fairness of price and the probability of large profits coming to the Company is to regard the state of things existing at the time the Company bought."

In *Twin Lick Oil Co.* vs. *Marbury*, 91 U. S., 587, the Court says (p. 593):

"That which would to-day sell for $1,000 as its fair value may, by the natural changes of a week of desperate enterprise, in the same time be made to yield that much every day."

It thus appears that from every point of view, the subscribers to the 20,000 shares received full value at the time.

5. The allegations of plan and conspiracy by Lewisohn and Bigelow set forth in the complaint (Record, pp. 3, 4, Paragraphs Third and Fourth), and the subsequent allegation (p. 9, Paragraph Fifteenth) that Lewisohn, and Bigelow, *pursuant to such* original plan and conspiracy, and *for the purpose* of furnishing working capital and funds to the corporation to develop its plants and other properties, caused the company to offer the remaining 20,000 shares of its capital stock, are wholly *irrelevant* and no inference could properly be drawn therefrom by the pleader or the Court, nor did the de-

murrer admit the correctness of any such inferences drawn by the pleader.

In the absence of allegation that *any such purpose* was *communicated* to the subscribers, repeated recitals of the existence of such purpose cannot make out a cause of action.

In *Ambler* vs. *Choteau*, 107 U. S., 586, the rule is stated by Chief Justice WAITE, at page 591, as follows :

"The words 'fraud' and 'conspiracy' alone, no matter how often repeated in a pleading, cannot make a case for the interference of a court of equity. Until connected with some specific acts for which one person is in law responsible to another, they have no more effect than other words of unpleasant signification. While in this case the offensive words are used often enough, the facts to which they are applied are not such as to make the defendants answerable to the complainant."

See also .

Van Weel vs. *Winston*, 115 U. S., at pp. 237, 238.

St. Louis, &c., Railway Co. vs. *Johnston*, 133 U. S., at page 577.

COURTS OF EQUITY WILL NOT BE ACTIVE IN SEEKING FOR INFERENCES IN AID OF A CLAIM AGAINST AN ESTATE BROUGHT MANY YEARS AFTER THE TRANSACTION AND AFTER THE DEATH OF THE TESTATOR THE PRINCIPAL PARTICIPANT THEREIN.

Every inference against the existence of fraud will be had in favor of parties acting under the advice of counsel of high standing in the community.

6. Taking the allegations of the complaint as they stand, Lewisohn and Bigelow, when they exchanged their property for 130,000 of the shares of

the corporation, took the risk of additional money not being subscribed thereafter to aid the corporation in developing the property. They could not know how much would ever be subscribed for working capital.

AFTER A SINGLE *cash* SHARE HAD BEEN SUBSCRIBED FOR, LEWISOHN AND BIGELOW COULD NOT HAVE *withdrawn* THE *property* FROM THE COMPANY.

When the 20,000 shares of stock were offered for sale all that had gone before was ended and it was of no concern to such subscriber whence the property had been acquired.

At what value, or at what original prices at the various different times in which such properties had been transferred from one to another until finally lodged in the company, were questions with which the subscribers did not concern themselves

7. THE COMPLAINT SPECIFICALLY ALLEGES THAT THE SUBSCRIBERS NEVER RECEIVED ANY INFORMATION (*fols.* 16, 19) AND THERE IS NO ALLEGATION FROM WHICH AN INFERENCE MAY BE FAIRLY DRAWN, THAT ANY INFORMATION WAS EVER OFFERED TO OR SOUGHT BY THEM.

The complaint frequently alleges that Lewisohn and Bigelow *purposed* to provide the company with working capital and *for this purpose* offered the 20,000 shares, but nowhere does the bill state that the subscribers were invited to *provide working capital* or that any statement was made *to them*, or any intimation *received by them* that they were subscribing working capital or contributing to a corporation which had any definite capital or which had issued any stated amount of stock for property. The allegations of intent and conspiracy

of Lewisohn and Bigelow, therefore, being in no way connected with inducements offered or statements made to the subscribers, can, as pointed out by Chief Justice Waite in *Ambler* vs. *Choteau*, *supra*, have no effect in determining such relations.

IT IS NOT ALLEGED THAT THE COMPANY, IN OFFERING THE STOCK, FURNISHED ANY INFORMATION TO THE SUBSCRIBERS RELATING TO THE PROPERTY ACQUIRED OR INFORMED THE SUBSCRIBERS THAT THEY WERE EXPECTED TO PROVIDE WORKING CAPITAL.

For anything that appears in the complaint *the subscribers* may have presumed that the money supplied by them would go in whole or in part at some future time to the acquisition by the company of additional mining properties.

The bill does not state that the subscriptions were based upon anything which had theretofore been done or intended by Lewisohn or Bigelow, whether disclosed or undisclosed.

If this Court shall casually wonder why parties should subscribe to stock in the absence of any *statement*, the answer is that the pleader had in reality an entirely different state of facts to deal with from what is disclosed by the complaint, upon which *real facts*, however, a cause in equity could not have been pretended.

The deficiency of the bill in this respect is not due to the oversight of the pleader, but to the actual absence of such statement.

In other words, the real transaction is not disclosed in the bill.

A fair explanation of the situation is that Bigelow and Lewisohn themselves sold the stock and furnished the money just as they sold 40,000 of *their* shares to the syndicate for $1,000,000. This was the form in which complainant *claimed* that its original bill stood (*ante*, Brief, pp. 5–6).

Even if the complaint alleged, as it does not, that the subscribers were specifically invited to *provide* working capital, it would be insufficient to impute liability in the absence of any proposition to form a company, or any statement of property acquired or of any proposition to acquire property. Courts of equity will not lend their aid to speculative suits based upon an "artificial case" (*Flagler Engraving Machine Co.* vs. *Flagler*, 19 Fed. R., p. 476) by suggesting necessary allegations where the *supposedly injured* parties have long slept on their rights and are not now complaining.

These comments are not intended to have any bearing upon the merits of the case but simply to ascribe to its proper cause the lack of allegation in the bill from which any inference could be drawn to account for the subscriptions to the 20,000 shares of stock, without statement of any kind by the company.

The failure to avail of the ample opportunity afforded by the leave to amend must be taken as conclusive against the pleader.

8. ON THE AVERMENTS OF THE COMPLAINT THE SUBSCRIBERS WERE VENDEES PURCHASING WITHOUT REPRESENTATION OR INDUCEMENT FROM THEIR VENDOR (THE COMPANY).

There was no other relation between the parties, and consequently no foundation for claim of any fiduciary relation.

It is not alleged that the subscribers to the 20,000 shares *had any dealings* with Lewisohn and Bigelow, *but only with the company.*

9. IF ANY LIABILITY AROSE IT COULD ONLY BE ENFORCED BY THE INDIVIDUAL SUBSCRIBERS DEFRAUDED.

For any damage to their rights the subscribers had their *individual remedy, not the company.*

Pomeroy on Eq. Jur., *supra*, says:

"First Class. Directors Guilty of Fraudulent Misrepresentations or Concealments. Where diractors or managing officers issue prospectuses, circulars or reports containing fraudulent misrepresentations or concealments concerning the company's affairs, and persons are induced by these documents to purchase shares of the stock, or to enter into contracts for their purchase, and thereby sustain a loss, such defrauded stockholders may, as has already been shown, either obtain the relief by repayment or rescission against the corporation, or may obtain relief against the fraudulent directors personally by means of an equitable suit for an accounting and repayment of the money, or by an action at law for the deceit. The equitable suits against the directors must plainly be brought *by the stockholders, and not by the corporation, since the wrong is not done to the corporate property or franchises, but consists wholly in a violation of the stockholders' proprietary rights in their shares of stock. Such a suit cannot be maintained by one stockholder suing on behalf of himself and all others similarly situated, the injury is several and individual; each defrauded stockholder must sue for himself*" (italics ours).

See also the distinction drawn by Morawetz on Private Corporations, 2nd Ed., Vol. 1, secs. 291, 292.

See also

Flagler Engraving Machine Co. vs. *Flagler*, 19 Fed. R., 468, 470; C. C. Mass. D.

Langdon vs. *Fogg.*, 18 Fed. R., 5, 8.

V.

THERE WAS NO DAMAGE.

Petitioner practically concedes that the only injury suffered was that the syndicate members and the subscribers did not make as *much profit* as they otherwise might (Petitioner's Brief, pp. 43, 44).

The bill alleges that the stock was worth *par* and *over for a long time after* (Record, p. 11, *fol.* 20. Opinion Circuit Court Appeals p. 31, *fol.* 56).

It is to be noted that the company received its entire property from Bigelow and Lewisohn on July 11th, 1895 (Record, p. 8, Par. 13). For this property 130,000 shares of the company were voted and issued. This property and the $500,000 received for the 20,000 shares, gave, as stated by the complaint, a value of $25 per share to the stock of the company, which continued to have such value *for a long time thereafter.*

Obviously, the properties were conveyed as one transaction, and their valuation must have been then considered and be so now considered. Certainly no other rule could be equitable as against Bigelow and Lewisohn, who were conveying the properties.

The *sum total* of the two properties, as represented by the 130,000 shares capital stock, is alleged by the complaint to have been of the value of or more than $3,250,000 *at the time* and *for a long time thereafter.* If one of the parcels was of less value, the other must have been of greater value than the amount fixed in the offer.

The obvious intention was to combine the properties.

Combination, itself, created a value.

In *Adams Express Co.* vs. *Ohio*, 166 U. S., 185, the Court said (p. 219):

"Wherever separate articles of tangible property are joined together, not simply by a unity of ownership, but in a unity of use, there is not infrequently developed a property, intangible though it may be, which in value exceeds the aggregate of the value of the separate pieces of tangible property."

Where the capital stock represented, as in the present case, only shares in the property conveyed, the *conceded value of that stock* correctly represented the value of the property.

In *State R. R. Tax Cases*, 92 U. S., 575, the Court says (p. 605):

"It is therefore obvious that when you have ascertained the current cash value of the whole funded debt, and the current cash value of the entire number of shares, you have, by the action of those who above all others can best estimate it, ascertained the true value of the road, of all its property, its capital stock and its franchises, for these are all represented by the value of its bonded debt and of the shares of its capital stock."

VI.

COMPLAINANT'S CLAIM IS GROSSLY INEQUITABLE.

A similar claim has been considered by the Court of Appeals of Nebraska, and condemned.

Home Fire Ins. Co. vs. *Barber*, 67 Neb., 644 (60 L. R. A., 927).

The Court, in that case, at page 663, said:

"There is another and still stronger reason why the present stockholders *have no standing* in a court of equity to complain of the transactions on which the suit is brought. To permit them to re-

cover, under the circumstances of the case at bar, would be highly inequitable. It would be to give them moneys to which they had no just title or claim whatever and would *enable them to speculate upon wrongs done to others with which they have no concern.* It would enable them to recover back a large part of the purchase money they paid and agreed to pay for the stock, notwithstanding they obtained and now retain all that they bartained for."

Under the rule stated in Pomeroy, *supra*, if subscribers to the 20,000 shares were entitled to any relief, it would be limited either to a rescission and payment for 20,000 shares of stock of the company or to the damages sustained by the holders of the said 20,000 shares of stock, and would not extend, as is sought by the present bill, to a rescission or payment for 30,000 *other* shares of stock. Obviously, there were *no other subscribers* except those subscribing to the 20,000 shares, as all the rest of the capital stock was sold to Bigelow and Lewisohn themselves. If any liability arises by reason of the company, through the control of Bigelow and Lewisohn, failing to disclose to the prospective purchasers of the 20,000 shares the actual cost to Bigelow and Lewisohn of the properties then held by the company and for which the 130,000 shares had been exchanged, it is a liability to *such of the purchasers* of the 20,000 shares as see fit to enforce their rights and *to the extent* to which *they could establish their damage* in case they elected to retain their stock and affirm the transaction. In the present suit *together with the suit brought upon the 100,000 shares* (Record, p. 17, Par. Twenty-sixth, *fol.* 29) it is sought to extend this right to the company itself and *to multiply* the liability *six fold* for the benefit of the holders not only of the 20,000 shares, but *of the entire* 150,000 shares of the capital stock of the com-

pany *including the profiting syndicate associates.* Thus Lewisohn and Bigelow are to be made to pay *again* to their syndicate associates or *their vendees* the 100 per cent. (30,000 shares), *profit already received.*

The Court, in *Home Fire Ins. Co.* vs. *Barber*, *supra*, at page 664, says :

"Recovery by or for the benefit of the present stockholders means, to put it plainly, that through the instrumentality of a court of equity, they are to get shares, worth by their own valuation $115 each for $55 each ; are to get back dividends which never would have been payable to them in any event and were not bargained for when they bought, and are to receive in addition to the shares worth $1.15 on the dollar 60 cents more on each dollar, imposed on Barber for his delinquencies. Barber wronged the old stockholders, his conduct in many respects was unconscionable and indefensible, but his fellow stockholders were supine for many years. They took no steps to investigate what he was doing or to protect or assert their rights. Now third parties, who bought all of Barber's shares, including those which he held as a result of his wrongful manipulation, seek to assert those rights and reap a profit thereby. *Because the inequitable conduct of Barber shocks the conscience of a chancellor is no reason why he should give his conscience a further shock by allowing Funkhouser and his associates to recover money to which they have no legal or equitable claim*" (italic ours).

The complaint avers (Record, p. 11, *fols.* 19, 20) that the capital stock of the company was at the time and *for a long time thereafter* of the *fair market value* of $25 per share, thus making the value of the property and cash subscribed equal to $3,750,000.

The company seeks to recover profits of $2,250,000 (p. 12) plus over twelve years' interest ($1,620,000), making a total recovery of over $3,870,000, which added to the above value of the property amounts

to $7,620,000, resulting in a value of over $50 per share.

Lewisohn and Bigelow's share in the syndicate (Record, p. 12, *fol.* 21) is alleged to have been 20,000 shares, one-half of which was profit. The remaining members of the syndicate are alleged to have had 60,000 shares, *one-half* of which was *profit*. Then the syndicate, other than Lewisohn or Bigelow, got 30,000 shares at $25 a share and 30,000 shares for nothing, averaging $12.50 per share for the whole 60,000 shares. In this way the holders of 20,000 shares valued in the complaint at $25 and for which was paid $25 per share would now hold the same shares at a valuation of $50 per share or double what was paid and the holders of 60,000 shares for which $12.50 was paid would now hold the same at $50 per share or quadruple what was paid.

The iniquity of the claim in the present case is certainly as great as that condemned by the Nebraska Court above quoted.

THE CORPORATION IS BEING USED TO OBVIATE THE WANT OF EQUITY IN THE STOCKHOLDERS.

As stockholders they would be unable to meet the requirements of Equity Rule 94 as to time of ownership of stock.

Home Fire Ins. Co., 67 Neb., pp. 657, 658.

Dimpfell vs. *Ohio & Mississippi R. Co.*, 110 U. S., 209, 211.

The corporation may not be used to work an injustice.

Seymour vs. *Spring Forest C. Assoc.*, 144 N. Y., 333, 340.

United States vs. *Milwaukee Refrigerator Transit Co.*, 142 Fed. R., 247, 254.

Bank vs. *Tubein*, 59 Ohio St., 316, 52 N. E., 834.
In re Rieger Kapner & Altmark, 157 Fed. R., 609.

VII.

THE SUBSCRIBERS ARE NOT COMPLAINING.

They have acquiesced. There is no allegation in the bill that they would not have subscribed had they known of the alleged profits.

New parties coming in long after, cannot substitute their construction or inferences as to what the subscribers themselves would or would not have done.

In *Flagler Engraving Machine Co.* vs. *Flagler*, 19 Fed. R., 468, C. C. Mass. D., the Court, LOWELL, J., says (p. 476):

"The purchasers, *some or all of them*, may have a right to set aside the sales, and to recover their money of the company or the defendants, or both, but they are necessary parties to the suit or suits, and they *cannot, by obtaining control* of the company, *set up an artificial case* and recover *through the company* what is really *their own loss*, from which the company *itself was enriched*" (italics ours).

VIII.

The Massachusetts Case.

Old Dominion Copper Mining & Smelting Co. vs. *Bigelow*, 188 Mass., 315.

The Massachusetts Court rests its decision in favor of the company upon a cause of action for damages

as for a tort of Bigelow as a director of the company in selling the property to the company without disclosing the cost thereof to him, and thus the Court held, contrary to the doctrine of the cases above cited, that there was fraud in the transaction and a violation of the duty owed by the director to an existing beneficiary with whom such director stood in fiduciary relations. The opinion, speaking of Bigelow and Lewisohn (p. 322), contains the following :

"On the other hand, if they elected to make a sale of it to one standing to them in a fiduciary relation, they were under an obligation to make a full disclosure to the beneficiary of all the facts known to them material to the property and the purchase, or see to it that the fiduciary had adequate independent advice. That is an obligation resting upon every fiduciary, who makes a sale of his own property to his beneficiary, no matter whether it is a case of trustee and *cestui que trust*, guardian and ward, solicitor and client, or promoter of a corporation and the corporation itself."

The opinion further refers (p. 324) to the decision of Judge Lacombe in the present case on the original bill, and to *Foster* vs. *Seymour* and *McCracken* vs. *Robison*, holding that the doctrine of those cases is inapplicable to the present case, first, because in the case of *Foster* vs. *Seymour* the bill did not seek to set aside the purchase for a failure to disclose a material fact in selling the property ; second, because the entire stock of the corporations in those cases was issued to the defendant, while, as claimed by the Massachusetts Court, such was not the fact in the *Bigelow* case.

In portions of the opinion there is some confusion as to whether *Bigelow* was liable as promoter or simply as trustee for a tort.

For example, the opinion almost at the beginning states (p. 320):

"It is clear that on the facts stated the defendant was a promoter of the plaintiff corporation."

The opinion distinctly states and at full length (p. 321) that Bigelow was not liable on the ground that the plaintiff corporation was entitled to the benefit of the original purchase, as a beneficiary is entitled where the property was bought for and resold to the beneficiary, at a profit, and that Bigelow was not liable as a promoter for secret profits, because he and Lewisohn had bought the property at a time when they were under no obligation to purchase it for the plaintiff company, and also states further along on same page:

"The fact that the property was bought with a view of reselling it to a corporation to be organized for the purpose, and that that purpose was ultimately carried into effect, does not give to the corporation subsequently organized in execution of the original purpose a right to the benefit of the purchase."

Well-known cases on this point are cited in this connection, and the Court expresses its concurrence therewith.

The opinion on page 322 declares that the rule in *Hayward* vs. *Leeson*, 176 Mass., 310, an earlier case before the same Court, had been adopted upon the ground of failure by the trustee in the sale to his beneficiary to disclose the cost of the property.

On page 326 the opinion, again referring to *Hayward* vs. *Leeson*, stated that the recovery in that case was for secret profits made by the promoters, and on page 327, that the rule in *Hayward* vs. *Leeson* applied to the present case.

Again, the opinion (last paragraph, p. 327) says :

"On the case stated in this bill the defendant was a promoter of the plaintiff corporation ; being a promoter he stood in a fiduciary relation to it," etc.

The Massachusetts Court, however, in considering the relief to which the company is entitled, does not award rescission or secret profits, which could be granted in a proper case either against trustees or promoters, but awards a relief, which in no case has been allowed against promoters or trustees *in the absence of false representations*, namely, *damages* for a tort.

In this respect the Massachusetts Court is in direct conflict with the highest courts of England and of the State of New Jersey.

In *New Sombrero Phosphate Co.* vs. *Erlanger*, 5 Ch. Div., 72, 83, the relief was specifically restricted to rescission.

In *Loudenslager* vs *Woodbury Heights Land Co.* (1899), 58 N. J. Eq. (13 Dick.), 556, 560, the recovery was restricted to the profit received.

The two cases last above cited while affording no support to the Massachusetts decision on the question of liability hold directly against the Massachusetts case as to the relief to be granted where liability exists.

In this connection it is to be noted that petitioner differs with the Massachusetts Court on the question of the proper relief by assigning error of the Circuit Court of Appeals in not granting an account of profits (Brief, p. 14, Fourth Specification).

The liability of Lewisohn and Bigelow as promoters will be considered later in this brief under the Second Point, at page 64 (*post*).

The theory deducible from the opinion in the Massachusetts case would seem to be as follows :

Bigelow and Lewisohn were, as to the holders of 96,000 shares, liable as promoters, the holders of the 96,000 shares being made up by the Court as follows (p. 323): To the syndicate associates were allotted 80,000 shares of the 100,000 shares issued by the company for the property of the Baltimore Company, 20,000 of such 100,000 shares having been retained by Lewisohn and Bigelow as a profit. From the 80,000 shares thus allotted to the syndicate there is to be deducted 4,000 shares received by Bigelow as a member of the syndicate, leaving 76,000 shares allotted to the members of the syndicate other than *Lewisohn* and Bigelow. The 20,000 shares issued to the subscribers for working capital added to the holdings of the syndicate members other than Lewisohn and Bigelow make the total sum as enumerated by the Massachusetts Court, of 96,000 shares. Liability as promoters is imposed upon Bigelow and Lewisohn for an *imputed* invitation by them to *intending subscribers* of those 96,000 shares *to become* stockholders in a corporation *thereafter to be formed* to acquire property, without any disclosure of an intended profit by Lewisohn and Bigelow in the transaction.

The opinion further assumes that Bigelow and Lewisohn as such promoters in failing to disclose their intended profit were liable jointly not only to rescission in a proper case at the company's election, or jointly for the secret profits made by them, but separately for damages *in solido* as tort feasors, the damages to be based upon the difference between the actual value of the property and the amount of stock received.

The Massachusetts Court was in error in assigning to the *syndicate members* the relation of beneficiaries to promoters. The Court evidently regarded such syndicate members as beneficiaries invited to subscribe to shares of the corporation to be formed,

and to acquire property owned or to be obtained by Bigelow and Lewisohn in total ignorance of *any profit* to be taken, and has applied in favor of Bigelow's associates the well settled principles of equity as to the rights of such beneficiaries and the liabilities of such promoters to the company. That such view was taken by the Massachusetts Court of the relations between the syndicate associates on the one hand, and Bigelow and Lewisohn on the other, and has controlled its decision is evident from the following language of the opinion (p. 322):

"In the second place the defendant contends that the corporation cannot complain because the facts were known * * * to the holders of all shares of capital stock of the corporation outstanding when the contract of purchase here in question was made, and because the purchase was acquiesced in by them. * * * On the allegations of the bill the defendant and Lewisohn are to be treated as the owners of all the shares then outstanding, and therefore the transaction is taken to have been known and acquiesced in by all the then stockholders.

It is proper to pause here and see just what this contention means."

The opinion then proceeds (p. 323) to state its construction of the statement of facts contained in the bill.

"When this contract was made on July 11, 1895, the authorized capital stock had just been increased from forty shares to one hundred and fifty thousand shares of $25 each, that is to say, from $1,000 to $3,750,000. Of the authorized capital stock only forty shares, or $1,000 had then been issued. As we have said, these forty shares are to be treated on the allegations of the bill as the property of the defendant and Lewisohn. The scheme of the defendant and Lewisohn as to this capital stock of $3,750,000, divided into one hundred and fifty thousand shares, was to issue eighty thousand shares (or $2,-

000,000) to the syndicate, or sell them to the public for cash to provide $2,000,000 to be paid to the syndicate; twenty thousand shares (or $500,000) to themselves for their services and expenses as promoters; twenty thousand shares (or $500,000) to the public for cash for working capital; and the balance, thirty thousand shares (or $750,000) to themselves for the real estate here in question. And this scheme was carried out. In carrying it out *no disclosure* was made to the *persons* who took *the syndicate's eighty thousand* shares (except those of the eighty thousand issued to the defendant and Lewisohn as members of the syndicate), nor to those who took the twenty thousand shares sold to the public for cash for working capital. Of the eighty thousand issued to or for the syndicate it is alleged that the defendant received four thousand. It is not alleged that any of this eighty thousand were issued to Lewisohn. The contention is that inasmuch as the defendant and Lewisohn owned all the forty shares of the corporation, amounting to $1,000, outstanding when the sale here in question was made by them to the corporation, the corporation is barred from complaining that a full disclosure of the material facts was not made by them to it" (italics ours).

The Court then proceeds to discuss the decision of Judge Lacombe in the present case and of the Court in *Foster* vs. *Seymour et seq.*

THE ALLEGATIONS OF THE BILL DO NOT PERMIT THE CONSTRUCTION ADOPTED BY THE MASSACHUSETTS COURT.

Of the 80,000 syndicate shares, not only the 4,000 of Bigelow's as syndicate member, but over 16,000 of Lewisohn's as such member must be deducted as chargeable with notice of all profit taken (Record, *fol.* 21). Then 30,000 more shares, (syndicate shares) the *bonus*

or profit stock (Record, p. 12, Par. Nineteenth), must also be deducted as chargeable with notice of being *wholly profit*. Finally the remaining 30,000 shares *purchased* (Record, p. 12, Par. Nineteenth) by the syndicate members from Bigelow and Lewisohn are chargeable with all the knowledge of the latter (Brief, *ante* p. 22 and Petitioner's Brief, p. 49).

Thus there is left of the 96,000 shares mentioned by the Court only the 20,000 shares subsequently offered by the company for cash to the subscribers without inducement on the one part or injury sustained on the other part.

The construction of Judge Lacombe is the only fair construction, which was to the effect that the entire 130,000 shares, including the 80,000 shares allotted by Bigelow and Lewisohn to the syndicate, were paid to Bigelow and Lewisohn for the property of the old Baltimore Company and issued to them or for their account and at their direction (Record, p. 8, *fols.* 14, 15, p. 10, *fol.* 17).

The only statement in the complaint that any stock was issued to persons other than to Bigelow and Lewisohn and their associates, is made with reference to the last 20,000 shares issued (p. 10, *fol.* 17). Furthermore, the statement of the complaint in describing the syndicate agreement (p. 3, *fols.* 6–7, p. 13, *fols.* 23–25), shows beyond question that not only was the stock to be issued to Bigelow and Lewisohn and by them divided amongst themselves and their associates, *but that profits were contemplated*, and that not Lewisohn and Bigelow alone but *all the members of the syndicate would profit at the expense of the corporation*. The complaint and the opinion in the Massachusetts case are therefore in conflict on the subject of disclosure to the syndicate members of a contemplated profit.

The syndicate agreement being between associates, *all of whom were contemplating a profit*

in the sale to the corporation, if Bigelow and Lewisohn were promoters, their *associate* syndicate subscribers *were equally promoters* and can in no sense be considered as *their own beneficiaries.* The syndicate agreement was intended by all parties thereto merely to provide *in part* means for acquiring property to be *sold thereafter* to a corporation *at a profit*, and the rate of profit to the syndicate members is stated in the complaint. So long as each syndicate member received the *pro rata* profit stated and his money back, it was immaterial to him who received the balance of the 130,000 shares of stock issued for the property. If any of the associates failed to receive his due he had a cause of action against Bigelow and Lewisohn.

So far as appears, Bigelow and Lewisohn carried out their agreement *to the satisfaction* of their associates.

NO ASSOCIATES HAVE BEEN FOUND TO COMPLAIN.

Under the circumstances, therefore, the corporation has no claim. Like agreements and like claims of right on the part of the corporation have been before the courts in other cases and the company held to be without cause of action (Brief, *Ante*, p. 23).

The Massachussets Court treats the holders of 96,000 shares as if they were parties invited by Lewisohn and Bigelow to *subscribe* to the stock of the company *to be formed* to acquire property from Lewisohn and Bigelow without disclosure of an intended profit by Lewisohn and Bigelow. The error of the Court in so considering the relation of the syndicate members to the transaction is clear and has been in detail above referred to.

The error of the Court in so treating the subscribers to the 20,000 shares is also clear.

The Court, in fixing the rights and relations of the holders of the 96,000 shares of stock, places great stress upon *an alleged plan* of Bigelow and Lewisohn at the outset *to cause the company ultimately to issue such shares in the manner set forth.* In fact, the Massachusetts Court relies solely upon this alleged plan of future action to give the character and relation to the holders of the 96,000 shares. No other ground for endowing those holders with the character, relations and rights allowed to them by the Court is even hinted at in the opinion.

NO PLAN OF ORGANIZATION WAS EVER SUGGESTED TO THE SUBSCRIBERS FOR THE 20,000 SHARES (*fols.* 16, 19) AND THE BILL OF COMPLAINT CONTAINS NO ALLEGATION NOR CAN ANY INFERENCE ARISE FROM ANY OF THE ALLEGATIONS THEREIN TO THE EFFECT THAT ANY INFORMATION AS TO PROPERTY OF ANY KIND WAS EVER IN ANY WAY COMMUNICATED TO SUCH SUBSCRIBERS.

In this connection the Massachusetts opinion states at the bottom of page 320 as follows :

"It is not alleged here that the defendant made any misrepresentation as to the price paid by himself and Lewisohn for the property resold to the plaintiff at an advance, as was the case in *Gluckstein* vs. *Barnes* (1900), A. C., 240 ; S. C. below, *sub nominee ; In re Olympia* (1898), 2 Ch., 153 ; *Hichings* vs. *Congreve*, 4 Sim., 420. Where one standing in a fiduciary relation makes such a misrepresentation it may well be that the purchaser can keep the property and force the vendor to make good the representation by paying to him, the purchaser, the difference between what was in fact paid by the vendor and what he represented that he paid for it."

Therefore, so far as those subscribers were concerned, it was immaterial and afforded no ground of right in them that Lewisohn and Bigelow had ever formed the alleged plan of issuing 20,000 shares for working capital. So far as disclosed by the bill, the subscribers to the last 20,000 shares issued were in the same position as if no plan had ever been previously formed by Bigelow and Lewisohn, or in fact in the same position as they would have been if Bigelow and Lewisohn had neither formed such a plan nor continued to be in any way connected with the company after the transfer by them of the property thereto. The materiality of the existence of such plan in any case would be contingent upon statements made to the subscribers of the 20,000 shares before the corporation was formed, or before the subscriptions were made, and as an inducement to such subscription.

EXCEPT AS AN INDUCING CAUSE FOR THE SUBSCRIPTION, ANY PLAN OF ORGANIZATION COULD HAVE NO EFFECT UPON THE TRANSACTION, AND UNLESS COMMUNICATED TO THE SUBSCRIBER NO PLAN COULD BE AN INDUCING CAUSE FOR HIS SUBSCRIPTION.

Statement of a plan and concealment of the intended profit were both essential to create any liability. Without statement of any plan, mere failure to disclose the intended profit afforded *no inducement* and created no liability.

THERE WAS NO FIDUCIARY RELATION BETWEEN THE PARTIES.

There was no basis for any fiduciary relation.

The subscribers' money was not used either in purchasing property or in reimbursing the so-called promoters.

NO STATEMENT WAS MADE OR PROSPECTUS ISSUED.

On the allegations of the bill, the subscribers were simply vendees, to whom the vendor (the company or the directors) owed no other duty than to answer fairly, if at all, any questions asked.

NO QUESTIONS WERE ASKED.

We have seen above that the Massachusetts Court confused the relation between Bigelow and Lewisohn on the one hand and the syndicate members on the other by applying the law governing promoters to that relation, a confusion recently noted by the New York Court of Appeals (*Blum* vs. *Whitney*, 185 N. Y., 232, at p. 242).

This manifest confusion undoubtedly extended to the relation of the subscribers.

The Massachusetts Court further erred in failing ing to construe the bill as one for *rescission*, and in granting relief for damages as for a tort, the rule having been elsewhere unanimously laid down that where the vendee sells property acquired in his own right without disclosing an intended profit the beneficiary in the absence of misrepresentation by the vendor, may rescind, but may not affirm the transaction and ask for damages (see Third Point, p. 76, *post*, Brief).

In the *Bigelow* case the opinion of the Massachusetts Court on page 323, while holding directly contrary to the ruling of the Circuit Court on the hearing of the present case, and to the rule of *Foster* vs. *Seymour*, and other cases contains the suggestion (p. 324) that it does not appear that the bill of complaint in the case of *Foster* vs. *Seymour* contained an allegation of failure by the vendors to disclose the cost of the properties transferred.

Such allegation would have been either super-

fluous or implied where *all the parties were cognizant of all the facts.*

To have alleged that the defendants did not disclose to themselves would have been as unnecessary as it was superfluous.

No cause can be predicated upon an allegation of a failure to disclose *what all the parties interested knew.*

> Am. & Eng. Ency. of Law, 2nd Ed., Vol. XIV, p. 113, subd. 5, and authorities cited.

That the distinction raised by the Massachusetts Court in commenting upon *Foster* vs. *Seymour* is without basis, appears from the subsequent decision of the New York Court of Appeals in *Blum* vs. *Whitney*, where the complaint contained distinct allegations of failure by the vendors to disclose the cost of the properties transferred, and yet the Court applied the same rule.

> Court of Appeals Cases and Points, 1906, N. Y. Law Institute Library, Vol. 2304, *fols.* 50, 78, 79, 81, 82.

The opinion in the *Bigelow* case after referring to *Foster* vs. *Seymour* and *McCracken* vs. *Robison*, states (p. 325) as follows:

"It is hardly necessary to point out the difference between such a case, where the scheme of the corporate organization does not contemplate there being any stockholders other than those who buy the stock issued in the transaction complained of, and a case like that now before us, *where ninety-six thousand* out of one hundred and fifty thousand shares are to be issued to persons to whom no disclosure was made" (italics ours).

Again (p. 326) the opinion states:

"The case submitted to us for decision here by the defendant's demurrer to this bill is a case where

(disregarding the forty shares subscribed for to organize the corporation) the whole capital stock was one hundred and fifty thousand shares, of which fifty-four thousand shares were to be issued to the promoters for services for the sale of the land here in question, *and the remaining ninety-six thousand* were to be issued to persons to whom the facts of this sale were not disclosed" (italics ours).

Also (p. 327):

"Again the corporation is not barred because when the agreement was made it acquiesced in the trade and it was then, from a legal point of view, fully born. That was equally true in *Hayward* vs. *Leeson* and the cases cited in that case. The answer to that suggestion is that *from a business point* of view *the agreement* was not made to bind the corporation with a capital of *$1,000, which was the corporation then in fact in existence*, but to bind the corporation with a capital of $3,750,000. It was to that corporation with a capital of $3,750,000 that a full disclosure ought to have been made, and to that corporation no disclosure was made" (italics ours).

Thus the Massachusetts Court repeatedly rests its decision upon its construction of the relation of the *syndicate members* to Bigelow and Lewisohn.

We have seen (*ante* Brief, p. 18) that the corporation as a legal entity was not injured.

In Equity the Corporation Assented.

Lewisohn and Bigelow were in equity the corporation itself.

As stated by the Circuit Court of Appeals (Record, p. 31):

"A corporation can only act through the human

beings who comprise it, it cannot be deceived or defrauded unless its stockholders and directors are defrauded."

In *Tompkins* vs. *Sperry Jones*, 96 Md., 560, the Court says at p. 583 :

" They at the time held all of its stock and were the sole owners of the company. They were in equity the company itself" (*Swift* vs. *Smith, Dixon & Co.*, 65 Md., 428).

In *Arkansas River Land, &c., Co.* vs *Farmers L. & T. Co.*, 13 Colo., 587, the Court says, at page 598:

" It is clear, therefore, that a body corporate cannot maintain a suit for equitable relief, except as the representative of the stockholders. It necessarily follows that if the shareholders are without equity they cannot, through the corporate organization, or in its name, obtain relief either for themselves or for the corporation."

In *Home Fire Ins. Co.* vs. *Barber*, 67 Neb., 644, the Court says, at page 665:

" * * * If a court of equity could not look behind the corporation to the shareholders, who are the real and substantial beneficiaries, and ascertain whether these ultimate beneficiaries of the relief it is asked to grant have any standing to demand it, the maxim that equity looks to the substance and not the form would be very much limited in its application.

Nowhere is it more necessary for courts of equity to adhere steadfastly to this maxim, and avoid the danger of allowing their remedies to be abused, by penetrating all legal fictions and disguises, than in the complex relations growing out of corporate affairs. Accordingly court and text writers have been in entire agreement that equity *will look behind the corporate entity* and consider who are the real and substantial parties in interest, whenever it becomes necessary to do so and promote justice or *obviate inequitable* results " (italic ours).

EQUITY ONLY REQUIRES THE CONSCIOUS ASSENT OF ALL EXISTING INTERESTS IN THE CORPORATION.

The assent relied upon by the Court in *Foster* vs. *Seymour*, *Parsons* vs. *Hayes*, *Blum* vs. *Whitney*, and like cases, was not a statutory or technical assent, as required by the Massachusetts Court. It was not even the assent of the *corporation*, as required by the Massachusetts Court, but the assent of all the existing interests in the corporation. It was an assent in substance and not in form.

Where all the existing interests are satisfied, equity neither regards the fictional entity of the corporation nor is concerned with its technical assent.

THE ASSENT REQUIRED IS OF THE CORPORATION AS IT EXISTED, NOT THE CORPORATION AS IT MAY *afterward* EXIST.

The assent required was one which would bind the corporation as it existed with 130,000 shares. No other corporation then existed. No corporation then existed with a capital of $3,750,000. There was no such corporation. *A corporation is not a corporation of any stated amount of capital until all such stated amount has been paid in or subscribed.* It is of no relevancy that the company, by its articles of incorporation, was *authorized* to have a capital *stock* of $3,750,000; the company did not thereby become a corporation with that amount of *capital.* It could only become such corporation after the issue of such amount of stock or subscription of that amount of capital. The requirement of the Massachusetts Court, therefore, rests upon technicality and not upon substance. The technical view was taken as of the corporation with its entire authorized stock, which was not in existence at the

time of the transaction and which might never have come into existence.

COURTS DISREGARD THE NOTION OF THE LEGAL ENTITY OF A CORPORATION WHEN PUT FORWARD EITHER TO PROTECT FRAUD OR TO WORK AN INJUSTICE.

United States vs. *Milwaukee Refrigerator Transit Co.*, 142 Fed. R., 247, 254, 255 (citing cases).

The disclosure called for by the Court in the Massachusetts case could in fact never have been made. There was not at the time a corporation with a capital of $3,750,000, and therefore no disclosure could have been made to such a corporation, nor does equity, as administered by the courts in *Foster* vs. *Seymour*, *Parsons* vs. *Hayes*, *Hutchinson* vs. *Simpson* and *Blum* vs. *Whitney*, require such disclosure. It was sufficient, and all that was required or could be required, was that that disclosure should be made to all the existing interests of the corporation.

In answer to the distinction made by the Massachusetts Court between the case then before it and the earlier cases of *Foster* vs. *Seymour*, etc., to the effect that in the *Bigelow* case all the stock issued at the time of the offer, was $1,000, it is only to be borne in mind that in those cases the qualifying shares held by the directors was not the only stock considered, *but the entire amount of stock issued as the result of the transaction.* In answer to the further distinction made by the Massachusetts Court that the existing issue in the *Bigelow* case was only $1,000, whereas *from a business point of view* the agreement was to bind the corporation with a capital of $3,750,000, the total authorized capital stock, it is to be noted as before that the Court in *Foster* vs. *Seymour* and like cases was not con-

trolled by the fact that the total *authorized* issue of the company was issued to the vendors, but that the *entire issued* stock, including that issued in the transaction was issued to the vendors. The Court in those cases places its decision specifically upon the ground that the *entire issued* capital stock was issued to the vendors, not that the entire *authorized* capital stock was so issued.

There can be no reason for the distinction made in the opinion in the Massachusetts case, but that there may be no doubt on the point we refer, in this connection, to the recent case of *Blum* vs. *Whitney, supra*, where the New York Court of Appeals applied the same rule, citing the cases, and where the precise situation existed, namely, an issue to the vendors of the *entire issued stock*, but *not of the entire authorized* stock, there *remaining unissued* a large amount, namely, $47,500,000 of unissued stock of the Distillery Company of America, out of $125,000,000, its total authorized capital stock.

The true criterion in such cases therefore is whether the *entire issued* stock of the company, including *not only the qualifying* shares of the officers and directors, and *those already held* by the vendors, but *also the stock to be issued in the transaction*, was issued to the vendors, and not whether any remainder of the authorized issue by plan or intention may be thereafter offered to other parties.

The Massachusetts Court does not intimate, nor can it be properly contended, that the potential right of the company to issue the last 20,000 shares of its authorized capital of 150,000 shares constituted any difference or ground for distinguishing the rule of *Foster* vs. *Seymour et seq.*

THERE IS NO GROUND FOR SUCH DISTINCTION IN REASON.

A corporation may, as in fact the complainant did (Record, p. 7), by the vote of its directors increase its capital stock, so that the rule of *Foster* vs. *Seymour*, *Parsons* vs *Hayes*, and other cases, was not applied to corporations beyond the possibility of such subsequent increase of capital stock and power to issue the same.

Both on reason and authority the distinction contended for on behalf of complainant in the present case must be considered as unsound.

THE MASSACHUSETTS COURT IN THE BIGELOW CASE DID NOT RELY UPON SUCH DISTINCTION.

The Massachusetts Court was evidently controlled, as we have seen above, by *its construction* of the *rights* of the *syndicate members*, and its view that such *syndicate members* were *existing beneficiaries* at the time of the sale to the corporation of the properties.

The opinion contains no reference to any difference between the situation existing *after* the issue of the 130,000 shares and *before* the issue of the remaining 20,000, shares, the Court relying, as we have seen, upon its view of the rights of the syndicate members, other than Bigelow to whom were issued 76,000 shares of the first 100,000 shares issued.

VI.

Other Cases Cited by Petitioner.

None of the cases cited upon petitioner's brief in support of its contention are applicable to the present case.

None of them present a transaction wherein the vendors dealt entirely with themselves and constituted the entire existing interest in the company, or had independently acquired the property and sold to the company for stock *without prospectus or statement* to subscribers.

From all the cases cited by petitioner as imposing liability on promoters the rule to be deduced is that before any liability arises either

1. Such promoter must have purchased the property with the funds of the company ;

2. Having previously purchased the property with his own funds, must have reimbursed himself from the funds of the company subscribed by others through his inducement.

Erlanger vs. *New Sombrero Phosphate Co. and others*, 3 Appeal Cases, 1218, 1235, and other cases cited *Post* brief, pp. 64, 65 ;

or

3. Have issued a prospectus containing inducements, false representations or concealments which tend to create a false impression and which amount to misrepresentation.

Gluckstein vs. *Barnes* (1900), A. C., 240.

Yeiser vs. *United States Board & Paper Co.*, 107 Fed. R., 340–347, and other cases.

Where none of these conditions exist, there is no liability, there being no basis for any fiduciary relation.

THE CASES CITED BY PETITIONER HAVE BEEN CONSIDERED IN RECENT CASES IN SUPPORT OF LIKE CONTENTIONS AND HELD INAPPLICABLE.

Blum vs. *Whitney, supra;* see Appellant's brief, New York Court of Appeals Cases and Points, N. Y. Law Institute Library, Vol. 2304, Case pp. 10, 12, 14, 17, 25, 62, 67, 68.

Hutchinson vs. *Simpson*, 92 App. Div., 382; see dissenting opinion of Hatch, J., p. 407.

In *Yeiser* vs. *United States Card & Paper Company*, 197 Fed. Rep., 340, decided by the Sixth Circuit and relied upon by appellant as conflicting with the decision herein, the defendants held an *option* for the purchase of manufacturing property for $75,000, formed a corporation and offered to sell to it the property for $100,000 in cash, issuing a misleading prospectus to subscribers to its stock by which the latter were led to believe that the property cost the defendants $100,000, and subsequently paying themselves the $100,000 furnished by the subscribers.

The defendants in that case were liable both as promoters, taking the money of the corporation obtained from subscribers to the stock to purchase the property and on account of the false prospectus under the rule of *Gluckstein* vs. *Barnes* (1900 A. C., 240). *The relief granted* was damages, the *same relief* as in *Gluckstein* vs. *Barnes, supra.*

In the Massachusetts case the Court rejects the promoters' liability cases, relying upon a single case, a previous decision (*Hayward* vs. *Leeson*, 176 Mass., 310), as applicable to the present situation. In *Hayward* vs. *Leeson* the facts presented a different situation. The corporation was insolvent and *the suit was by a receiver.* The properties of the East Tennessee Land Co., when its stock was offered to subscribers, had not been acquired or paid for except in part. Mere options therefor

had been granted. The money received from the subscribers was to be applied to the completion of the purchase. The Massachusetts Court in the *Bigelow* case, at pages 326, 327, *confirms these facts and concedes the difference.*

Furthermore, in *Hayward* vs. *Leeson*, there was a *false prospectus* the opinion of the Court in dealing with the question of fraud refers on two separate occasions to this prospectus, quoting its alluring statements.

On page 313 of the opinion the Court says :

" In this *prospectus* it is stated, among other things, that: 'The capital stock of this company represents actual value without inflation, but does not approximate the entire value of the properties on which it is based. It was the intention of the projectors and incorporators to shape this enterprise so that its stock should *be as solid* as that of a *national bank.* Over half a million dollars of its capital was subscribed before the company's organization, at par. Subscriptions for the remainder are now solicited.' And *no other reference was made* to the fact that the $700,000 of *paid up shares* in question had been subscribed for and *no statement* was made *as to the way* in which those $700,000 of shares had been *paid for and issued*" (italics ours).

And again on page 320 of the opinion the Court says :

" But there is a *further finding* which gives to the defendants' action a *more serious* character, and that finding is this : '*The prospectus* * * * was issued with the consent and approval of the defendants * * * and was *widely circulated* among the general public.' That prospectus contains the following statement : '(Repeating the language of the prospectus above quoted.)' The defendants therefore *not only did not disclose* to their principals the fact that stock to the amount of $700,000 par value was issued to them and their associates as remuneration for promotion service, *but a prospectus*

containing an *incorrect* and *misleading, if not false,* statement was *issued with their consent and approval"* (italics ours).

The opinion in *Hayward* vs. *Leeson* further states (p. 321) that, upon the *facts of the case,* the company could keep the property and sue the promoter under the rule of *In re Olympia,* 2 Ch. (1898), 153, which is the title below of *Gluckstein* vs. *Barnes* (1900), A. C., 240.

Gluckstein vs. *Barnes* has elsewhere been construed as resting upon the false representation,

> *Hutchinson* vs. *Simpson,* 92 App. Div. (N. Y.), 382, 388.
>
> *In re Lady Forest Gold Mine, Limited,* 1901, 1 Ch, 582, 588 (Ch. Div., 1901),

and not applicable to the present case.

> *Old Dom. M. & S. Co.* vs. *Bigelow, supra,* see Brief, *ante,* p. 50.

In the *Bigelow* case the Massachusetts Court states that the ground of the decision in *Hayward* vs. *Leeson* was the failure of the defendants to disclose to the parties interested as beneficiaries the cost of the property or the profits to themselves as vendors. This assumes, *as was the fact in the Hayward case,* that there were such parties interested, namely, persons invited to subscribe cash for stock in the company, which cash was to be used to pay for the properties and thus complete the sale. In the present case the property was paid for, and the sale completed, by the vendors themselves. Therefore, whether *Hayward* vs. *Leeson* turned upon the question of a false prospectus or upon the purchase of the property with the money of the subscribers, is wholly immaterial, as neither of those grounds exist in the present case.

SECOND POINT.

Defendants are not liable as promoters.

The established rule as to the liability of a promoter upon a sale to the company is as follows:

(1) To the corporation, for rescission or for a recovery of secret profits, at the election of the corporation, where the property has been acquired by the promoter with the means furnished by the subscribers to the corporation, and the promoter has failed to disclose to subscribers any profit resulting to him in the transaction.

Chandler vs. *Bacon*, 30 F. R., 538.
Loudenslager vs. *Woodbury Heights Land Co.*, (1899), 58 N. J. Eq. (13 Dick.), 556, 561.

and other cases.

(2) To the company, for rescission, where the property has been acquired by the promoter with means independent of the corporation or of the subscribers, the promoter, having induced the subscriptions, takes the subscribers' money in payment, fails to disclose his intended profit, and there has been no conscious assent of all the existing interests in the corporation; but in such case the sole relief is *rescission*, and the company may not retain the property and recover the secret profits of the promoter, or damages based upon the difference between the value of the stock paid for the property, and the actual value of the property.

New Sombrero Phosphate Co. vs. *Erlanger*, 5 Ch. Div., 72, 83.

Erlanger vs. *New Sombrero Phosphate Co. & others*, 3 Appeal Cases, 1218, 1235.

In re Ambrose L. T. & C. M. Co., 14 Ch. Div., 390.

In re Cape Breton Co., L. R., 26 Ch. Div., 221.

In re Cape Breton Co. (on appeal), L. R., 29 Ch. Div., 795.

Burland vs. *Earle*, Appeal Cases, (1902), 83 (Privy Council).

Insurance Press vs. *Montauk Wire Co.*, 103 App. Div., 472, 476 *et seq.*, N. Y.

And many other cases.

(3) To the company for *damages* where the promoter, although acquiring the property by his independent means, makes false representations to the subscribers of the stock of the company as to the cost of the property to himself.

Gluckstein vs. *Barnes* (1900), Appea Cases, 240.

Yeiser vs. *U. S. Board & Paper Co.*, 107 Fed. R., 340, 347.

Hayward vs. *Leeson*, 176 Mass., 310, 320, 321,

and other cases.

The acts of the defendants set forth in the complaint created no liability as promoters.

The term "promoter" is ambiguous, and in each case what the so-called promoter did must be ascertained before liability can be inferred.

In Lindley's Law of Companies, 5th Ed., 349, it is stated :

"Care must be taken not to be misled by words. Owing to the ambiguity in the meaning of the word

promoter * * * it is unsafe to say that any particular person was a promoter of a particular company, and to infer from thence that he is liable to account to it as if he had been its trustee. The question in each case must be what has the so-called promoter done to make himself liable to the demand against him? What fraud or breach of trust has he committed or been a party to? If none, he is under no liability; if any, he is liable accordingly." * * *

In *Lindley, etc., Co.* vs. *Bird*, L. R. (1886), 33 Ch. Div., 85, at page 93, LINDLEY, L. J., uses the following language:

"Moreover, to say that James Bird was a promoter of the company and therefore liable to account to it, is calculated to mislead; for the word 'promoter' is ambiguous, and it is necessary to ascertain in each case what the so-called promoter really did before his legal liabilities can be accurately ascertained. In every case it is better to look at the facts and ascertain and describe them as they are."

Calling them "promoters" does not impose any liability.

In *Hutchinson* vs. *Simpson*, 92 App. Div., at page 398, the following language was used:

"I do not suppose that calling them promoters itself imposes any liability. It is the relation that in fact existed between the persons upon whom a liability is sought to be imposed and the corporation in whom vests the cause of action which is sought to be enforced that must determine the question as to the liability of the defendants. If, as between the corporation and the individual defendants, a fiduciary relation is established, then of course there is imposed upon the agent or trustee the obligations that follow from that relation, but to establish that liability the relation must be shown to exist." * * *

Defendants were not promoters in the sense of the term as applied hitherto in any case in which they

have been held liable as such. In all the cases where the Courts have held the parties liable as promoters the transactions have been between the defendants and the future subscribers. In the present case all of the transactions took place between the defendants and themselves (the company), and before there were any purchasers (Record, p. 12, Par. Nineteenth), or any subscribers, or any offer to future subscribers (Record, pp. 8, 9).

If any cause of action arose to the complainant company by reason of the acts of the defendants, it must have arisen at the time and before any other stock was offered or sold.

All the acts of the defendants had been done at that time. If no cause of action existed at the time of the completion of the transactions complained of, none thereafter could arise by reason of such previous acts.

THERE WAS NO RELATION OF PROMOTERS TO SUBSCRIBERS.

The Associates did not *subscribe* for any stock. By agreement (p. 4) they joined with Bigelow and Lewisohn. They *covenanted* with Lewisohn and Bigelow for a *profit* in *cash* or in stock and took that profit (30,000) shares in stock. They *covenanted* for the return of their advances in cash but they *bought* their other stock (30,000) shares from Lewisohn and Bigelow (*fol.* 21) under the option afterward offered to them.

When the 20,000 shares were offered there was no company thereafter to be formed which the subscribers were solicited to join. The company was already formed and possessed all its property. Afterward it offered for sale stock for cash *without statement or inducement* (*fols.* 16, 19). The subsequent subscribers were, therefore, not approached as parties to form a corporation thereafter to take over property or to join a corporation which had

already taken over any *stated* property or which had any *stated* capital stock, either issued or authorized.

Promoters as such only become liable because of their transactions with subscribers to the stock of the company, whose subscriptions they solicit in order to obtain the money from the company.

If the defendants, by causing the company to sell to subscribers the remaining unissued 20,000 shares of the stock, incurred any liability, it would be to such subscribers, and not to the company. The cause of such liability must have arisen after the transactions complained of had been entirely completed, and the injury, if any, caused by such acts would be to the subscribers and not to the company.

THE COMPANY WAS NOT INJURED BY THE ACTS OF THE DEFENDANTS IN CAUSING THE SALE OF THE REMAINING CAPITAL STOCK FOR WORKING CAPITAL.

The company received the cash in full.

If it had not been injured before the sale of the 20,000 shares, it was not injured by such sale; it was never injured, and therefore has no cause of action.

As to the 130,000 shares of stock issued for the properties and the mining claims, the defendants were in no sense promoters. They owned the property individually; they organized themselves into a company; they dealt with themselves, and no one else; and they took back from themselves the stock of the company which they owned, in exchange for the property which they owned. They certainly were not promoters to themselves, and, up to and including the completion of the transaction by which they received the 130,000 shares of stock from their company, they had no transactions with anyone else. They, therefore, were not promoters as to anyone else. Nor can directors be held to be promoters merely because for the purpose of obtaining capital to work the properties already ac-

quired by the company, they offer to subscribers for cash the remaining unissued capital stock of an existing corporation at par, in the absence of any representations or statements in offering the stock. Nor does their intention so to do, had by them at the outset, before they organized the company, make them subsequently promoters.

NO FIDUCIARY RELATION EXISTED BETWEEN THE ORGANIZERS AND THE TECHNICAL CORPORATION.

Blum vs. *Whitney*, 185 N. Y., 232, 242.

Any liability must be predicated upon their relations with the subscribers. Their relations to such subscribers are determined solely by the transactions between those parties.

THE FIDUCIARY RELATION MUST RESULT, IF AT ALL, FROM SOME AGREEMENT TO THAT END, EXPRESS OR IMPLIED, BETWEEN TWO OR MORE PERSONS.

In re Ambrose Tin & Copper Mining Co., L. R. (1880), 14 Ch. Div., 390.
In re Coal Economizing Gas Co. (Gover's Case), L. R. (1876), 1 Ch. Div., 182, 187.
Erlanger vs. *New Sombrero Phosphate Co.*, L. R., 3 App. Cas. (1878), 1218.
Spaulding vs. *No. Milwaukee Townsite Co.*, 106 Wis., 481, at p. 491.
Old Dominion Copper Co. vs. *Bigelow*, 188 Mass., 315, at pp. 321, 322.

In *Brewster* vs. *Hatch*, 122 N. Y., 349, the Court recognized and expressly declared the direction which the inquiry should always take in deter-

mining whether a so-called promoter is or is not to be charged with the duties and disabilities of a fiduciary. The question always is, What was the contract of the so-called promoter, as gathered from the writings between the parties and the representations by which the exchange of papers was induced? The Court said (p. 359):

"The question is, was the relation between these litigants simply that of vendor and vendees of shares to be issued, or was it one of trust and confidence, binding the defendants to the exercise of good faith and to disclose such information as they possessed affecting the value of the property in which the plaintiffs were induced to purchase an interest. * * * The *true relation* existing between these parties must be sought for in *the contracts* found by the Court to have been entered into, in the *prospectus* which the defendants put forth, and in the circumstances involved in the transaction" (italics ours).

Whether the intention to offer the remaining stock to subscribers for cash was formed before or after the directors organized the company and transferred the property to it, in no wise affects their relation to such subscribers. In all of the cases where promoters have been held liable as such to the company it will be noted that either *an appeal* has been made to subscribers *before the corporation* is formed to furnish the means to purchase the properties, or, after the corporation has been formed, to furnish cash to the company, formed with *stated* properties, in return for its stock, the promoters reimbursing themselves for the property out of the cash furnished upon such statement.

The authorities cited by appellant are to the effect that where stock is sold *to obtain the means with which to purchase the properties* transferred to the company, relief may be had at the instance

of the company in behalf of purchasers of such stock (Petitioner's Brief, pp. 18–27).

In those cases *prospectuses were issued* and the *money of the subscribers* was *used* to *acquire* the properties.

This distinction has been clearly pointed out and followed.

Tompkins vs. *Sperry, Jones & Co.*, 96 Md., 560, 581.
Salomon vs. *Salomon* (1897), A. C., pp. 22, 33.
In re British Seamless Paper Co., L. R., V. Ch. A., p. 467.
Old Dominion C. M. & S. Co. vs. *Bigelow*, 188 Mass., pp. 315, 321.

In *Tompkins* vs. *Sperry, Jones & Co.*, *supra*, the Court says (p. 581):

"The proposition that no fraud is involved in the transmutation of property suitable to the purposes of a corporation into the form of corporate securities in the manner adopted by Sperry and Jones in the present instance has been recently decided after a full examination and discussion of the subject by the House of Lords in *Salomon* vs. *Salomon*, App. Cases, 1897, p. 22, and was also adopted in *In re Ambrose Lake Tin Co.*, L. R., 14 Chy. Div., 390. * * *

There is no real conflict between these authorities and those relied on by the appellant. In *Gluckstein* vs. *Barnes*, L. R. App., 1900, p. 240, and *Erlanger* vs. *New Sombrero Phosphate Co.*, L. R., 3 App. Cas, 1218, the promoters had a secret profit in the land, which the corporation was formed to take over, and they issued a prospectus which did not disclose the fact, and thereby induced other persons to subscribe to the stock."

In *Salomon* vs. *Salomon & Co.* (1897), A. C. 22, the attempt was made to apply the doctrine of *Erlanger* vs. *New Sombrero Phosphate Co.* to a

case in which all the stock and bonds had been originally issued to persons owning the property, as in the present case. The House of Lords, in distinguishing the *Erlanger* case, say (p. 33):

"But if every member of the company—every shareholder—knows exactly what is the true state of the facts, * * * no case of fraud upon the company could here be established. * * *

Assuming the price paid for the business was an exorbitant one, * * * when all the shareholders are perfectly cognizant of the conditions under which the company is formed and the conditions of the purchase, it is impossible to contend the company is being defrauded."

In *Old Dominion C. M. & S. Co.* vs. *Bigelow*, *supra*, the Massachusetts Court says (188 Mass., p. 321):

"When the defendant and Lewisohn bought this real estate they were under no obligation to make the purchase of it for the plaintiff corporation, which was not then in existence. Having bought the property at that time and paid for it with what, as between them and the plaintiff corporation, was their own money, they could have kept it or resold it to the plaintiff corporation or to anybody else, as they saw fit. The fact that the property was bought with a view to reselling it to a corporation to be organized for the purpose, and that that purpose was ultimately carried into effect, does not give to the corporation subsequently organized in execution of the original purpose a right to the benefit of such purpose" (citing cases).

In re British Seamless Paper Co., *supra*, is referred to *ante* (Brief, p. 15).

In the present case the complaint shows that Bigelow and Lewisohn raised the moneys to purchase all the properties transferred to the complainant company, including the real estate, the sale of which is sought to be rescinded (Record, p. 3, *fols.* 6–7).

The subsequent issue of 20,000 shares of capital stock by the complainant is stated in the complaint (*fols.* 5 and Par. Fifteenth, *fol.* 15) to have been for the purpose of obtaining working capital for the corporation and *no misrepresentation* as to the value of the properties already possessed by the company is alleged to have been made by Bigelow or Lewisohn in inducing these subscriptions.

IF SUCH MISREPRESENTATIONS HAD BEEN MADE, BIGELOW AND LEWISOHN WOULD HAVE BEEN PERSONALLY LIABLE, *not to the company but to the subscribers* FOR THE DAMAGES SUSTAINED *by each.*

Tompkins vs. *Sperry, Jones & Co.*, 96 Md., 560, 581.
Pomeroy Eq. Jur., 3rd Ed., Vol. 3, § 1099, p. 2116.

In Petitioner's Brief, *Dickerman* vs. *Northern Trust Co.*, 176 U. S., 181; *Re Leeds & Hanley Theatres* (1902), 2 Ch., 809, and *Re British Seamless Paper Box Co.*, L. R., 17, Ch. D., 467, are chiefly relied upon. Upon the facts of those cases, neither of them is in point.

In *Dickerman* vs. *Northern Trust Co.* (*supra*), mere options were acquired, the properties not being furnished by the promoters. The stock of the company was issued in payment of the properties, a secret profit being taken by the promoters or agents, who arranged the consolidation of the various properties into one corporation. The Petitioner also relies upon this case for a sufficiently sweeping definition of the word "promoter" to include the present case. The definition quoted by the learned Justice in delivering his opinion was adopted from Cook on Stockholders, Section 651, and must equally with the author thereof, be taken with reference to

the context, which was, in the case then under consideration, the state of facts therein existing, and, in the mind of the text writer, the various cases from which the definition was evolved. Neither the learned Justice nor the text writer could have expected that the definition adopted would ever be applied so literally as to render it absurd. Under Petitioner's construction it was applicable in every one of the many cases in which the Courts have refused to apply it.

In *Re Leeds & Hanley Theatres* (*supra*), promoters through an agent agreed to sell to the company, and a prospectus was issued inviting subscriptions. Out of the cash obtained from the subscribers the purchase price of the property was paid, the promoters receiving a large part of it. The Court, by WRIGHT, J., in his opinion points out that the defendants never intended to buy as their own the property and that the purchase was not completed until they had caused the company to provide most of the means. VAUGHAN WILLIAMS, L. J. and ROMER, L. J., dwell upon the important effect of the prospectus in inducing the subscribers to furnish the money which was used, and upon the fraudulent nature of the prospectus.

In *Re British Seamless Paper Box Co.* (*supra*), where, under appellant's construction, the definition adopted in *Dickerman* vs. *Northern Trust Co.* (*supra*), might also have been followed, the Court refused to impose any promoter's liability. The language of *dicta* in the opinion, however, is again misapplied by Petitioner in aid of its contention. The expression occurring in the opinion "future allottees" must be taken with reference to the context and not to mean any and all allottees, however invited to subscribe and regardless of the circumstances attending their subscriptions. The opinions quoted from contain express references to the im-

portance of a prospectus or inducement held out to "future allottees."

Separate consideration of other cases cited by the Petitioner is unnecessary, as all of them, either from the statements of fact given in the brief or contained in the reports, are plainly inapplicable.

The present case is radically different from all others where the defendants were held liable as promoters. In the present case the subscribers were offered stock in a corporation already organized and *possessing the entire assets* (Record, pp. 9, 10, par. Sixteenth). Where defendants have been held as promoters, the subscribers were invited to pay cash to the corporation to be used by the promoters to purchase the property. In the present case the purchasers of stock *trusted nothing* either to the discretion or to statements of the promoters. In the other cases the purchasers *trusted everything* to the *discretion* or *statements* of the promoters.

THERE WAS NO FRAUD UPON EITHER THE COMPANY OR THE SUBSCRIBERS TO THE 20,000 SHARES OR INJURY TO EITHER.

We have seen that there was no fraud *upon the company* in the issue of the 130,000 shares of stock to the defendants for the mining properties and for the mining claims. We have also seen that there was no fraud practiced by the defendants by representations to the subscribers.

Neither was there any injury inflicted.

In effect the company being Lewisohn and Bigelow simply gave paper certificates to itself in return for property received from itself.

It is idle to suppose that any one invited to subscribe to shares of a corporation *already possessed*

of property would imagine for a moment that the property had been acquired by the corporation from the owners thereof *without profit* to those owners.

In the absence of representations, all that the intending subscriber considers is the probability of the company developing its property and increasing the value of their investment.

WHAT THE PROPERTY COST IS OF NO CONCERN TO THE SUBSCRIBERS UNLESS BY A SPECIFIC STATEMENT THEY ARE MISLED AND INDUCED TO PURCHASE.

THIRD POINT.

Rescission, where possible, the sole relief.

EVEN IF OTHERS HAD BEEN INTERESTED IN THE COMPANY THE COMPLAINANT WOULD BE ENTITLED, NOT TO DAMAGES, BUT ONLY, IN A PROPER CASE, TO RESCISSION.

If directors sell to a company, in which others are interested, property, either at an overvaluation or without disclosing the cost to themselves of the property, the relief open to the company is disaffirmance of the contract, when possible, in a suit for rescission, where jurisdiction can be had *over all the sellers.*

The failure of persons, holding a fiduciary relation and dealing with their *cestui que trust*, to *disclose the cost* of property sold is not such fraud as will permit the *cestui que trust* to retain the property and recover *damages* as for *deceit.*

Aliud est celare aliud tacere.

The cases to be found in the reports in which failure to disclose is held to be a ground for damages are, without exception, where concealment by tending to create a false impression, amounted to misrepresentation.

THE FAILURE OF THE TRUSTEE OR DIRECTOR TO FULFILL HIS DUTY AND DISCLOSE THE COST OF THE PROPERTY SOLD BY HIM, IN THE ABSENCE OF ANY MISREPRESENTATION ON HIS PART, DOES NOT CONSTI-

TUTE CONCEALMENT OR DECEIT SOUNDING IN DAMAGES, BUT ONLY AFFORDS THE BENEFICIARY THE RIGHT, UNDER PROPER CIRCUMSTANCES, TO RESCIND THE TRANSACTION.

New Sombrero Phospate Co. vs. *Erlanger*, L. R., 5 Ch. D., p. 72, 83.
Erlanger vs. *New Sombrero Phosphate Co. & others*, 3 Appeal Cases, 1218.
In re Ambrose L. T. & C. M. Co., 14 Ch. Div., 390.
In re Cape Breton Co., L. R., 26 Ch. Div., 221.
In re Cape Breton Co. (on appeal), L. R., 29 Ch. Div., 795.
Ladywell Mining Co. vs. *Brookes*, L. R. (1887), 35 Ch. Div., 400.
Bentinck vs. *Fenn*, L. R. (1887), 12 App. Cases, 652, 658, 659, 664, 671.
Burland vs. *Earle*, Appeal Cases, 1902, p. 83.
Great Luxembourg R. R. vs. *Magnay*, 25 Beav., 586.
Re Lady Forrest Gold Min. Li't'd., L. R. (1901), 1 Ch. Div., 582, 588, 589, distinguishing *Gluckstein* vs. *Barnes*.
Higgins vs. *Lansingh*, 154 Illinois, 301, 380.
Insurance Press vs. *Montauk Wire Co.*, 103 App. Div., 472, N. Y.

In *Erlanger* vs. *New Sombrero Phosphate Co.*, *supra*, the Lord Chancellor, Lord CAIRNS, at page 1235, says:

"The part of the case of the respondents which, as an alternative, sought to make the appellants account for the profit which they made on the re-

sale of the property to the respondents, on an allegation that the appellants acted in a fiduciary position at the time they made the contract on the 30th of August, 1871, is not, as I think, capable of being supported, and this, as I understand, was the view of all the judges in the courts below."

In *re Ambrose L. T. & C. M. Co.*, 14 Ch. Div., 390, the Court says (p. 398), by COTTON, L. J. :

"* * * That the company are at liberty to treat these persons as trustees of the property for the company, and, treating them as trustees, to allow them only what they paid for the property, and if they got anything else out of the coffers of the company, to make them account for that. Neither on principle nor on authority can that be maintained, unless at the time when the so-called vendor acquired the property he either acquired it for the company or was in such a position of fiduciary relation to the company that any purchase made by him of property available for the company must be considered as a purchase made by him as a trustee for the company. * * * I can quite understand an action to set aside the contract altogether, but it is not the course adopted by the company. I can see no ground either on principle or authority on which the company can say, not seeking to set aside the contract: 'We will hold you as passing this to the company, not because you originally acquired it for the company, but because you entered into a contract to sell to the company which is not binding, and therefore we make another contract to take it from you for what it originally cost you, making you account for whatever else under that invalid contract you stipulated should be paid for it.' I am of opinion that this cannot be maintained, and therefore the order we have to deal with cannot stand."

In *re Cape Breton Co.*, L. R., 21 Ch. Div., 221, the Court, Pearson, J. (p. 230), cites with approval the reasoning of Lord Justice Cotton *In re Ambrose*

L. T. & C. M. Co., supra, also the language of Lord Cairns in *Erlanger* vs. *New Sombrero Phosphate Co., supra*, and held that while the company might have the choice either to affirm the contract or rescind it, a *third course proposed* to be taken, namely, to *keep* the *property* and ask the vendors practically now to enter into a new contract and to be considered as having sold the property, not for the price at which they agreed to sell it, but for the price at which they themselves had purchased it, was a *relief unknown to the Court* and which *could not* be given.

Upon the subsequent appeal in the case (L. R., 29 Ch. Div., 795), the decision of the Court below was affirmed, Cotton, L. J., after full discussion, adopting the views of Justice Pearson below, and FRY, J., saying (p. 812) as follows:

"I think that the case is one in which the adoption of the contract by the principal puts an end, and ought to put an end, to any further rights against the agent. It appears to me that to allow the principal to affirm the contract, and after the affirmance to claim, not only to retain the property, but to get the difference between the price at which it was brought and some other price is, however you may state it, and however you may turn the proposition about, to enable the principal against the will of his agent, to enter into a new contract with the agent, a thing which is plainly impossible, or else it is an attempt on the part of the principal to confiscate the property of his agent on some ground which, I confess, I do not understand."

In *Burland* vs. *Earle*, *supra*, the judgment of the House of Lords and Privy Council was delivered by Lord DAVEY, who said (p. 98):

"Both courts have held that the re-sale (purchase) was *by Burland's (a director) advice and influence, and was made without disclosing to the company* the price at which he had purchased. It was also

held in the same court of appeal that Burland had bought the property with the intention and for the purpose of reselling it to the company. * * * But their Lordships do not think it necessary to pursue these topics, because they are of opinion that the relief prayed by the amended statement of claim and granted in the court below is altogether misconceived. There is no evidence whatever of any commission or mandate to Burland to purchase on behalf of the company, or that he was in any sense a trustee for the company of the purchased property. * * * Let it be assumed that the company or the dissentient shareholders might by appropriate proceedings have at one time obtained a decree for rescission of the contract. But that is not the relief which they ask or could in the circumstances obtain in this suit. The case seems to their Lordships to be exactly that put by Lord Cairns in *Erlanger* vs. *New Sombrero Phosphate Co.* (Lord Davey proceeds to quote the language of Lord Cairns hereinabove quoted.) * * * Reference may also be made to the judgments of Pearson, J., and Cotton and Fry, L.JJ., *in re Cape Breton Co. To rescind the sale is one thing, but to force on the vendor a contract to sell at another price is a totally different thing*" (italics and bracketed words ours).

The *Massachusetts* case, cited and relied upon by petitioner on this point (Brief, p. 68) affirms the rule denying recovery of profits (188 Mass., 315, 321), citing *Parker* vs. *Nickerson*, 137 Mass., 48; *New Sombrero Phosphate Co.* vs. *Erlanger, supra; Erlanger* vs. *New Sombrero Phosphate Co., supra*, and *Ladywell Mining Co.* vs. *Brookes, supra.*

Parker vs. *Nickerson*, *supra*, relied upon by petitioner is not only thus expressly distinguished by the Massachusetts Court, *supra*, but also by the nature of the property sold, coal, having a market value and obtainable in the market, *In re Cape Breton Co.*, L. R. 29, Ch. Div., 795. COTTON, J., page 805.

Of the other cases cited on Petitioner's Brief, pp. 67, 68, 71, those in which alternative relief was given are inapplicable, the defendants therein having either purchased the property with the subscribers' money or made false representations. In none of them was the sole existing fault of defendant mere failure to state the cost of the property to him.

Cases where defendant is not the owner or vendor but makes a secret commission or profit as agent are also inapplicable, nothing having come from him.

The Supreme Court of Massachusetts, in holding *contrary to the explicit rule* and *extended reasoning of the above cases*, that, solely because of the failure of Lewisohn and Bigelow to disclose the cost to themselves of the property transferred, the complainant company is entitled to retain the mining claims and at the same time to recover from Bigelow or Lewisohn the difference between the value which the Court may put upon those claims and the shares paid for them *neither cites authority* nor affords *any discussion or reason* for its holding beyond the statement that Bigelow and Lewisohn were "promoters."

Being promoters does not, however, involve them in all sorts of liability (cases cited under Second Point), and the Massachusetts Court in its opinion points out (188 Mass., pp. 321, 322) that they were not liable for profits, having purchased the property with independent means not acquired from the company.

Nor does any rule laid down in the case of *Hayward* vs. *Leeson*, 176 Mass., 310, cited by the Court (where the same Court held the promoters of a corporation liable to account for the net profits because *of the issuance of a prospectus by such promoters inviting subscriptions to stock, the proceeds of which were used to purchase the proper-*

ties), render promoters liable in the absence of such prospectus, the promoters acquiring the property by their independent means.

The Massachusetts Court, 188 Mass., pp. 326, 327, says:

"If in the case at bar the 96,000 shares not issued to the promoters had been offered to the public for cash to be used in buying the property of the Old Baltimore Company, and for working capital, and had been taken by them, the case at bar would have come directly within the decision in *Hayward* vs. *Leeson*."

The difference in the facts between the two cases is essential, and takes the present case out of the scope of the rule applied in *Hayward* vs. *Leeson*.

This difference has been clearly recognized and commented upon in the authorities above cited in this point.

These authorities emanating from the highest English tribunals, eminent text writers and the Appellate Courts of the States must be considered as outweighing that of the Massachusetts Supreme Court especially when they are accompanied by extensive discussion and sound reasoning upon the particular point and in the absence of discussion in the opposing opinion.

FOURTH POINT.

Albert S. Bigelow is an indispensable party in whose absence a bill for rescission cannot be maintained.

(1) The bill discloses the joint interest of Albert S. Bigelow and of Leonard Lewisohn, defendants' testator.

This disclosure is distinct, emphatic and repeated.

The rescission sought is of the transfer to the complainant of certain mines and mining claims known as the Old Dominion Mine, the New York Mine, the Keystone Mine, and a certain parcel of land in Arizona, all of which had formerly been owned by the stockholders of Old Baltimore Company, the title being held by one William Keyser (Record, p. 3, *fol.* 4), and from him acquired by the said Bigelow and the said Lewisohn.

The complaint at *folio* 5 states that prior to May 24th, 1895, Bigelow and Lewisohn formed the plan of acquiring the said property held by Keyser; that (*fol.* 9, paragraph seventh) on or about June 13, 1895, Bigelow, in conjunction with Lewisohn, for the purpose of carrying out their plan made an agreement with Keyser.

"In pursuance of this plan and conspiracy *they* required said Keyser to undertake to convey said claims and real estate *to them* without payment of any additional consideration upon said executors assenting thereto."

And (*fol.* 10, paragraph eighth) that Bigelow and Lewisohn *for their common benefit* acquired from Keyser the said property theretofore standing in his name.

The complaint further states (*fol.* 10):

"Said conveyance was made to said Leonard Lewisohn and the title to said property was acquired by him for the common benefit of himself and said Bigelow, as hereinafter set forth, and as a part of the plan and conspiracy hereinbefore set forth."

The complaint further states (*fol.* 18):

"The stock of said Baltimore Old Dominion Company and said parcels of real estate were acquired in the manner aforesaid *with intent on* the part of said Leonard Lewisohn and *of said Bigelow* to sell said property of said Baltimore Old Dominion Company and said parcels of real estate for a much larger price."

The complaint further states (*fol.* 19):

"By the transactions above set forth *said Bigelow and* said Leonard Lewisohn carried out their said plan and conspiracy * * * and *acquired* * * * *for themselves as they claimed* * * * all the property conveyed by said Leonard Lewisohn to the complainant * * * thereupon did sell * * * and also sold * * * all the property conveyed to said Leonard Lewisohn." * * *

The complaint further states (*fol.* 28):

"Thereafter, to wit, on or about September 12, 1902, the complainant offered *to said Bigelow and to the respondents* to rescind the sale and conveyance to it from said Leonard Lewisohn of said parcels of real estate in Arizona, to wit, the parcels known as the Old Dominion Mine, the New York Mine, the Chicago Mine, Keystone Mine, and parcel of real estate," etc.

Not alone from the general tenor of the complaint is the joint interest of Bigelow and Lewisohn apparent. Their joint interest is distinctly pleaded, so that there is no doubt, that the transaction sought

to be rescinded was a joint one on the part of Lewisohn and Bigelow.

In fact the complaint offers an excuse for omitting Bigelow as a defendant (*fol.* 29) based on his non-residence within the district.

The formal offer of the real estate to the complainant company was made in the name of Lewisohn (p. 20), probably because the legal title thereto stood in his name, although the property had been, as the complaint repeatedly states, acquired by both Bigelow and Lewisohn for their common benefit, and that they (Bigelow and Lewisohn) sold the same to the complainant.

It will be noted, however, that the formal offer contained a reference to the interest of Bigelow and a request to pay the consideration, namely, 30,000 shares of stock, to Bigelow as well as Lewisohn.

The bill setting forth a joint interest in the subject-matter in Bigelow makes him an indispensable party without whom rescission cannot be had.

Shields et al. vs. *Barrow*, 17 How., 129.

Wall vs. *Thomas et al.*, 41 Fed. Rep., 620.

Bell vs. *Donohoe and others*, 17 Fed. Rep., 710.

Chadbourn et al. vs. *Coe et al.*, 45 Fed Rep., 822.

Ribon vs. *Railroad Companies*, 16 Wall., 446.

Gregory vs. *Stetson*, 133 U. S., 579, 586.

California vs. *Southern Pacific*, 157 U. S., 229, 249.

Minnesota vs. *Northern Securities Co.*, 184 U. S., 199.

Barney vs. *Baltimore City*, 6 Wall., 280, 285.
Bank vs. *Carrollton Railroad*, 11 Wall., 624, 631.
Coiron et al. vs. *Millaudon*, 19 How., 113, 115.
Williams et al. vs. *Bankhead*, 19 Wall., 563, 571, 572.
Arkansas S. R. Co. vs. *Union Sawmill Co.*, 154 Fed. R., 304, 311, C. C. A.
New Sombrero Phosphate Co. vs. *Erlanger*, L. R., 5 Ch. D., pp. 73, 83.
Price vs. *Minot*, 107 Mass., 49, 63.

The cases cited on this point in Petitioner's Brief, pp. 72, 73, are inapplicable.

In *Barney* vs. *Baltimore City*, 6 Wall., 280, held that part owners or tenants in common of real estate in which partition in equity is asked, were indispensable parties.

In *Elmendorf* vs. *Taylor*, 10 Wheat., 152, held that where complainants are tenants in common entitled to a specifically described portion of the whole tract, which does not interfere with the remainder, co-tenants are not indispensable parties.

In *Payne* vs. *Hook*, 7 Wall., 425, held that in a suit by one distributee against an administrator and his sureties, the other distributees were not indispensable parties because the controversy was not with them but with the administrator and his sureties, nothing being alleged against such other distributees.

In *Union Mill & Mining Co.* vs. *Dangberg*, 81 Fed. Rep., 73, the Court held that one tenant in common might in equity restrain an infringement upon his rights to a specific quantity of water from a stream, no co-tenant having or asserting any rights adverse to complainant's claim.

In *Mackay* vs. *Gabel*, 117 Fed. Rep., 873, held that a third person, a grantor in the deed of the property who had parted with all his interests in the property of every character *to the defendant* prior to the commencement of this suit, was not an indispensable party.

NOT ALONE BIGELOW'S RIGHTS BUT DEFENDANT'S RIGHTS REQUIRE BIGELOW'S PRESENCE AS A PARTY TO ANY RESCISSION.

It is only where the director fraudulently misapplies the money or property of a company, in which others than himself are interested, that he can be held liable separately and in damages.

Cunningham vs. *Pell*, 5 Paige Ch., 607, 612, N. Y.
Boyd vs. *Gill*, 19 Fed. R., 145, 146.

The rule as to joint tort feasors does not apply.

Loudenslager vs. *Woodbury Heights Land Co.*, 58 N. J. Eq., 556, 558, 559, 561.

In *Old Dominion C. M. & S. Co.* vs. *Bigelow*, (*supra*), the Massachusetts Supreme Court in its opinion, substantially conceded the indispensability of both Lewisohn and Bigelow as parties to a bill for rescission by *not granting rescission*, but allowing *damages* as for an equitable *tort*, and overruling the demurrer on that ground.

The averment in the bill to the effect that Bigelow is not a resident within the jurisdiction of the Court does not relieve the bill from the difficulty.

It is well settled that neither the Act of Congress nor the 47th Equity Rule enables the Court to

make the decree prayed for in the absence of Bigelow.

Shields et al. vs. *Barrow*, 17 How., 129, 140, 141.

Coiron vs. *Millaudon*, 19 How., 113, 115.

Woodward vs. *McConnaughey*, 106 Fed. Rep., 758, C. C. A.

In *Shields et al.* vs. *Barrow* (*supra*), the opinion of the Court (pages 140, 141 and 142) discusses at length the effect of the Act of Congress, F. Stat. at L., 321, passed February 28, 1839, and the 47th Equity Rule, and held that notwithstanding the Act of Congress and the Rule no decree for rescission could be made in the absence of one of the parties to the original contract.

In *Coiron et al.* vs. *Millaudon et al.* (*supra*), which was a suit to set aside a sale, the Court uses the following language (p. 115):

" Nicolet & Co., and Van Brugh Livingston and wife, the mortgage creditors, or their legal representatives, were therefore necessary parties to the bill, as any decree made in the case disturbing the sale may seriously affect their interests.

This objection has been anticipated in the bill, and an averment made that these parties were out of the jurisdiction of the Court. But it is well settled that neither the Act of Congress of 1839 (5 U. S. Stat. at Large, 321, Sec. 1) nor the 47th Rule of this Court enables the Circuit Court to make a decree in a suit in the absence of a party whose rights must necessarily be affected by such decree, and that the objection may be taken at any time upon the hearing, or in the Appellate Court (17 How., 130; 1 Peters, 299)."

In *Wall* vs. *Thomas* (41 Fed. R.), the Court held (p. 622), as follows:

" Section 737 of the United States Revised Stat-

utes does not affect the question. Nothwithstanding that provision, the Court can make no decree affecting the rights of an absent person, and none between the parties before it which so far involves and depends upon the rights of an absent person that complete and final justice cannot be done between the parties present without affecting those rights (*Shields* vs. *Barrow*, 17 How., 130)."

The tender of the property by the complainant set forth in the bill of complaint (*fol.* 28) is to Bigelow and Lewisohn.

A reconveyance of all of the property to Lewisohn's representatives would obviously deprive Bigelow of his rights in the matter.

On the other hand, no tender or conveyance of less than all the property can be made to either Bigelow or Lewisohn, the property not being capable of any ratable division.

The prayer for relief contains (*fol.* 30) a provision that the representatives of Lewisohn shall return to the complainant the *entire* consideration for the conveyance. This obviously cannot be performed in view of the receipt by Bigelow of a share of the consideration directly from the company.

SO THAT NEITHER CAN THE COMPLAINANT RETURN TO EITHER THE PROPERTY RECEIVED BY IT, NOR CAN IT REQUIRE EITHER BIGELOW OR LEWISOHN *separately* TO RETURN THE ENTIRE CONSIDERATION RECEIVED THEREFOR.

ON BOTH OF THESE GROUNDS THE RESCISSION IS IMPOSSIBLE.

FIFTH POINT.

Rescission in part is not permissible.

The sale of the properties constituted one transaction and the company cannot rescind any part while retaining the rest. The properties were all of the same character—copper mines—situated in the same locality, and held by the same prior owners (pp. 2, 3, Par. Second).

They were all acquired by Lewisohn and Bigelow jointly and for the same consideration (Record, pp. 4, 5, Par. Sixth), and were sold by them to the company on the same day, and at the same meeting (Record, p. 8, Pars. Thirteenth and Fourteenth).

Though the offers were separate in form owing to difference in chain of title, they were parts of the same transaction.

> *Ready* vs. *Pinkham*, 181 Mass., 351, and cases cited;
> *Van Horne* vs. *Crain*, 1 Paige Ch., 455.

Petitioner (Brief, p. 37) rests complainant's case upon the *theory* of one transaction not completed until September 18th, 1895, although on July 11th, 1895, the property had been offered and accepted by the vote of the directors and possession obtained July 12, 1895.

If, as petitioner contends, the offer by the company of July 18th, 1895, to the public of 20,000 shares for cash was *part* of *one* transaction, which included the sale of the property to the company, the sale of those properties was part of *one and the same* transaction. Any theory which unifies the sale of the cash stock by the company with pre-

vious sales of property to the company *ex necessitate* unifies the sales of the property.

PARTIAL RESCISSION IS NOT TOLERATED IN EQUITY.

Perley vs. *Balch*, 23 Pickering, 286.
Sheffield Nickel Co. vs. *Unmen*, 2 Q. B. D., 223.
Morse vs. *Brackett*, 98 Mass., 503.
Merril vs. *Beckwith*, 163 Mass., 503.

SIXTH POINT.

The bill of complaint is multifarious in that different reliefs inconsistent with each other are prayed for.

The bill (Record, p. 26, Par. Twenty-sixth) states at length the desire of complainant for rescission and its offer of reconveyance of the property.

This necessarily involves an *election to rescind.*

Old Dom. Co. vs. *Lewisohn et al.* 136 Fed Rep., 915.

The prayer of the bill is three-fold :

For a decree of rescission of the sale of the real estate made by Bigelow and Lewisohn to the complainant in payment for which the complainant issued and they received the 30,000 shares of the capital stock of the company (*fol.* 30).

In the alternative, "*and in case complainant is not entitled to rescind said sale,*" for an assessment of the damages suffered by the complainant by reason of the sale, and judgment for said damages (*fol.* 30).

For such other relief as to the Court shall seem meet (*fol.* 30).

The first two, the prayer for rescission and the prayer for damages, are distinct and inconsistent.

The first proceeds on the theory *that the sale is void.*

The second proceeds on the theory *that the sale is valid.*

A bill in equity praying for such inconsistent reliefs is multifarious.

Daniels' Ch. Pl. & Pr., 385.

St. Louis, V. & T. H. R. Co. vs. *Terre Haute R. Co.*, 33 Fed. Rep., 440, 448.
Shields vs. *Barrow*, 17 How., 129, 143.
Wilkinson vs. *Dobbie*, 12 Blatch, 298, 301, 302.
Emans vs. *Emans*, 14 N. J. Eq., 114; cited with approval in *Walker* vs. *Powers*, 104 U. S.

WITH ELECTION DECLARED AND RESCISSION INSISTED UPON, THERE CAN BE NO RECOVERY FOR DAMAGES.

Williams vs. *Jackson*, 107 U. S., 478, 484.
Lloyd vs. *Brewster et al.*, 4 Paige, 537 N. Y.
Connihan vs. *Thompson*, 111 Mass., 270.

The judgment should be affirmed, with costs.

Upon the whole case, there was no fraud upon the company in the sale of the properties, all parties interested at the time assenting, or upon the syndicate associates in view of their common interest with Lewisohn and Bigelow in the transaction, or upon the subscribers to the 20,000 shares in view of their relation to the company as vendees purchasing without inquiry, inducement or misrepresentation. The Circuit Court of Appeals in its decision properly followed the rule of *Foster* vs. *Seymour*, and like cases in other jurisdictions.

Both the syndicate associates and the subscribers to the 20,000 shares have assented to the transaction not now and never having complained. The only complaint ever made has no other foundation than a stale and technical claim on behalf of the legal entity of the corporation upon an "artificial case" instituted by other than the original interests and after new interests had come into ownership and control of the company. The suit is therefore not only without equity, but against all the equities.

April, 1908.

Respectfully submitted,

EDWARD LAUTERBACH,
EUGENE TREADWELL,
Counsel for Respondents.

OLD DOMINION COPPER MINING AND SMELTING COMPANY *v.* LEWISOHN.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 206. Argued April 16, 20, 1908.—Decided May 18, 1908.

A corporation remains unchanged and unaffected in its identity by changes in its members, nor does it change its identity by increasing its capital stock; and its legal action is equally binding on itself after such an increase as it was prior thereto.

A corporation should not be allowed to disregard its assent previously given in order to charge a single member with the whole results of a transaction to which the greater part—in this case thirteen-fifteenths—of its stock were parties for the benefit of the guilty and innocent alike.

148 Fed. Rep. 1020, affirmed.

THE facts are stated in the opinion.

Mr. Louis D. Brandeis and *Mr. Edward F. McClennen*, with whom *Mr. William H. Dunbar* was on the brief, for petitioner:

The sale was made by promoters to a corporation organized for the purpose and exclusively controlled and represented by them.

A corporation is entitled to relief against a sale made to it by promoters who themselves control the corporation unless all persons entitled to object acquiesce.

The rule is universal that if a vendor stands in a fiduciary relation to his vendee the sale is voidable, unless independently acquiesced in by the latter with full knowledge of all material

facts. *Wardell* v. *Railroad Co.*, 103 U. S. 651, 658; *Thomas* v. *Peoria & R. I. R. Co.*, 36 Fed. Rep. 808; *Tyrrell* v. *Bank of London*, 10 H. L. C. 2.; *Aberdeen Railway Co.* v. *Blaikie*, 1 McQueen, 461.

A promoter stands in a fiduciary relation to the corporation he promotes, and is subject to this rule. *Dickerman* v. *Northern Trust Co.*, 176 U. S. 181; *Teiser* v. *U. S. Board & Paper Co.*, 107 Fed. Rep. 340; *Hayward* v. *Leeson*, 176 Massachusetts, 310; *Old Dominion Copper Co.* v. *Bigelow*, 188 Massachusetts, 315; *Central Trust Co.* v. *East Tenn. Land Co.*, 116 Fed. Rep. 743; *Yale Gas Stove Co.* v. *Wilcox*, 64 Connecticut, 101; *Chandler* v. *Bacon*, 30 Fed. Rep. 538; *Burbank* v. *Dennis*, 101 California, 90; *The Telegraph* v. *Loetscher*, 127 Iowa, 383; *Hinckley* v. *Sac Oil & Pipe Line Co.*, 132 Iowa, 396; *Camden Land Co.* v. *Lewis*, 101 Maine, 78; *Fred Macey Co.* v. *Macey*, 143 Michigan, 138; *South Joplin Land Co.* v. *Case*, 104 Missouri, 572; *Ezter* v. *Sawyer*, 146 Missouri, 302; *Woodbury Heights Land Co.* v. *Loudenslager*, 55 N. J. Eq. 78; *S. C.*, 56 N. J. Eq. 411; *S. C.*, 58 N. J. Eq. 556; *First Avenue Land Co.* v. *Hildebrand*, 103 Wisconsin, 530; *Hebgen* v. *Koeffler*, 97 Wisconsin, 313; *Hitchcock* v. *Hustace*, 14 Hawaii, 232; *Erlanger* v. *New Sombrero Co.*, 3 App. Cas. 1218; *Gluckstein* v. *Barnes*, A. C. 240.

The liability of the promoter exists independently of any misrepresentation, of the issue of a prospectus, or of the particular method in which the transaction is carried out. *Gilman C. & S. R. R. Co.* v. *Kelly*, 77 Illinois, 426, 435; *Dutton* v. *Willner*, 52 N. Y. 312; *Hayward* v. *Leeson*, 176 Massachusetts, 310; *Salomon* v. *Salomon*, A. C. 22; *Tompkins* v. *Sperry*, 96 Maryland, 560.

The duty of the promoters extends to all persons whom they bring in as original subscribers for stock, whether before or after the transaction complained of. Morawetz on Private Corporations (2d ed.), § 294; *Dickerman* v. *Northern Trust Co.*, 176 U. S. 181; *Geiser* v. *U. S. Board & Paper Co.*, 107 Fed. Rep. 340, 348; *Chandler* v. *Bacon*, 30 Fed. Rep. 538; *Hayward* v. *Leeson*, 176 Massachusetts, 310, 320; *South Joplin Land Co.* v.

Case, 104 Missouri, 572, 579; *In re Leeds & Hanley Theatres*, 2 Ch. 809.

The subscribers for the twenty thousand shares issued for cash were persons interested, who did not acquiesce. *Dickerman* v. *Northern Trust Co.*, 176 U. S. 181.

The members of the Old Dominion Syndicate were persons interested, who did not acquiesce. *Arnold* v. *Searing*, 67 Atl. Rep. 831, 832; *Brewster* v. *Hatch*, 122 N. Y. 349.

There was clearly no disclosure and therefore no acquiescence if persons other than the promoters themselves were concerned. *Gluckstein* v. *Barnes*, A. C. 240, 249.

Mr. Eugene Treadwell, with whom *Mr. Edward Lauterbach* was on the brief, for respondents:

The company is without equity in the premises. There was no fraud on the company. Since at the date of the transaction sought to be rescinded, Bigelow and Lewisohn owned all the stock of the complainant, constituted the entire stockholding interest of the company and received all of the stock of the company issued, including the stock issued by the complainant for the property in question, there was no one who could in equity complain. *Foster* v. *Seymour*, 23 Fed. Rep. 65; *McCracken* v. *Robison*, 57 Fed. Rep. 375; *Stewart* v. *St. Louis &c. R. Co.*, 41 Fed. Rep. 736, 738; *Dupont* v. *Tilden*, 42 Fed. Rep. 87; *Wood* v. *Corry Water Works*, 44 Fed. Rep. 146, 149; *Fort Madison Bank* v. *Alden*, 129 U. S. 373, 378; *Barr* v. *N. Y., L. E. & W. R. R. Co.*, 125 N. Y. 263, 273; *Seymour* v. *Spring Forest Assn.*, 144 N. Y. 333; *Thornton* v. *Wabash Ry. Co.*, 81 N. Y. 462, 467; *Parsons* v. *Hayes*, 14 Abb. N. C. 419, 434; *King* v. *Barnes*, 109 N. Y. 267; *Insurance Press* v. *Montauk Wire Co.*, 103 App. Div. (N. Y.) 472; *Blum* v. *Whitney*, 185 N. Y. 232; *Higgins* v. *Lansingh*, 154 Illinois, 301, 331, 336; *Spaulding and Another* v. *North Milwaukee Town Site Co.*, 106 Wisconsin, 481, 488; *In re Ambrose*, L. R. 14 Ch. D. 390, 395, 399; *In re British Seamless Paper Co.*, L. R. 17 Ch. D. 467; *Salomon* v. *Salomon*, L. R. (1897) A. C. 22; Cook on Corpora-

tions (5th ed.) §§ 46, 47, 649; 1 Morawetz on Priv. Corp. (2d ed.) § 290; 3 Pomeroy on Eq. Jurisp. (3d ed.) § 1092.

The company was not injured by the exchange on July 11, 1895, for property duly received, of 130,000 of the 150,000 authorized shares of the capital stock, in the absence of any cash capital or other shares outstanding, either issued, contracted for or offered.

The company was not injured by the subsequent offer for sale on July 18, 1895, of the remaining 20,000 shares of its authorized capital stock at par for cash, as it duly received and always retained the entire amount, $500,000, in cash, no part ever going to Lewisohn or Bigelow in any form.

The company, therefore, suffered no injury.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity brought by the petitioner to rescind a sale to it of certain mining rights and land by the defendants' testator, or in the alternative to recover damages for the sale. The bill was demurred to and the demurrer was sustained. 136 Fed. Rep. 915. Then the bill was amended and again demurred to, and again the demurrer was sustained, and the bill was dismissed. This decree was affirmed by the Circuit Court of Appeals. 148 Fed. Rep. 1020; 79 C. C. A. 534. The ground of the petitioner's case is that Lewisohn, the deceased, and one Bigelow, as promoters, formed the petitioner that they might sell certain properties to it at a profit, that they made their sale while they owned all the stock issued, but in contemplation of a large further issue to the public without disclosure of their profit, and that such an issue in fact was made. The Supreme Judicial Court of Massachusetts has held the plaintiff entitled to recover from Bigelow upon a substantially similar bill. 188 Massachusetts, 315.

The facts alleged are as follows: The property embraced in the plan was the mining property of the Old Dominion Copper Company of Baltimore, and also the mining rights and land

now in question, the latter being held by one Keyser, for the benefit of himself and of the executors of one Simpson, who with Keyser owned the stock of the Baltimore company. Bigelow and Lewisohn, in May and June, 1895, obtained options from Simpson's executors and Keyser for the purchase of the stock and the property now in question. They also formed a syndicate to carry out their plan, with the agreement that the money subscribed by the members should be used for the purchase and the sale to a new corporation, at a large advance, and that the members, in the proportion of their subscriptions, should receive in cash or in stock of the new corporation the profit made by the sale. On May 28, 1895, Bigelow paid Simpson's executors for their stock on behalf of the syndicate, in cash and notes of himself and Lewisohn, and in June Keyser was paid in the same way.

On July 8, 1895, Bigelow and Lewisohn started the plaintiff corporation, the seven members being their nominees and tools. The next day the stock of the company was increased to 150,000 shares of twenty-five dollars each, officers were elected, and the corporation became duly organized. July 11, pursuant to instructions, some of the officers resigned, and Bigelow and Lewisohn and three other absent members of the syndicate came in. Thereupon an offer was received from the Baltimore company, the stock of which had been bought, as stated, by Bigelow and Lewisohn, to sell substantially all its property for 100,000 shares of the plaintiff company. The offer was accepted, and then Lewisohn offered to sell the real estate now in question, obtained from Keyser, for 30,000 shares, to be issued to Bigelow and himself. This also was accepted and possession of all the mining property was delivered the next day. The sales "were consummated" by delivery of deeds, and afterwards, on July 18, to raise working capital, it was voted to offer the remaining 20,000 shares to the public at par, and they were taken by subscribers who did not know of the profit made by Bigelow and Lewisohn and the syndicate. On September 18, the 100,000 and 30,000

shares were issued, and it was voted to issue the 20,000 when paid for. The bill alleges that the property of the Baltimore company was not worth more than $1,000,000, the sum paid for its stock, and the property here concerned not over $5,000, as Bigelow and Lewisohn knew. The market value of the petitioner's stock was less than par, so that the price paid was $2,500,000, it is said, for the Baltimore company's property and $750,000 for that here concerned. Whether this view of the price paid is correct, it is unnecessary to decide.

Of the stock in the petitioner received by Bigelow and Lewisohn or their Baltimore corporation, 40,000 shares went to the syndicate as profit, and the members had their choice of receiving a like additional number of shares or the repayment of their original subscription. As pretty nearly all took the stock, the syndicate received about 80,000 shares. The remaining 20,000 of the stock paid to the Baltimore company, Bigelow and Lewisohn divided, the plaintiff believes, without the knowledge of the syndicate. The 30,000 shares received for the property now in question they also divided. Thus the plans of Bigelow and Lewisohn were carried out.

The argument for the petitioner is that all would admit that the promoters (assuming the English phrase to be well applied) stood in a fiduciary relation to it, if, when the transaction took place, there were members who were not informed of the profits made and who did not acquiesce, and that the same obligation of good faith extends down to the time of the later subscriptions, which it was the promoters' plan to obtain. It is an argument that has commanded the assent of at least one court, and is stated at length in the decision. But the courts do not agree. There is no authority binding upon us and in point. The general observations in *Dickerman* v. *Northern Trust Co.*, 176 U. S. 181, were *obiter*, and do not dispose of the case. Without spending time upon the many dicta that were quoted to us, we shall endeavor to weigh the considerations on one side and the other afresh.

The difficulty that meets the petitioner at the outset is that

it has assented to the transaction with the full knowledge of the facts. It is said, to be sure, that on September 18, when the shares were issued to the sellers, there were already subscribers to the 20,000 shares that the public took. But this does not appear from the bill, unless it should be inferred from the ambiguous statement that on that day it was voted to issue those shares "to persons who had subscribed therefor," upon receiving payment, and that the shares "were thereafter duly issued to said persons," etc. The words "had subscribed" may refer to the time of issue and be equivalent to "should have subscribed" or may refer to an already past event. But that hardly matters. The contract had been made and the property delivered on July 11 and 12, when Bigelow, Lewisohn and some other members of the syndicate held all the outstanding stock, and it is alleged in terms that the sales were consummated before the vote of July 18 to offer the stock to the public had been passed.

At the time of the sale to the plaintiff, then, there was no wrong done to any one. Bigelow, Lewisohn and their syndicate were on both sides of the bargain, and they might issue to themselves as much stock in their corporation as they liked in exchange for their conveyance of their land. *Salomon* v. *Salomon & Co.* [1897], A. C. 22; *Blum* v. *Whitney*, 185 N. Y. 232; *Tompkins* v. *Sperry*, 96 Maryland, 560. If there was a wrong it was when the innocent public subscribed. But what one would expect to find, if a wrong happened then, would not be that the sale became a breach of duty to the corporation *nunc pro tunc*, but that the invitation to the public without disclosure, when acted upon, became a fraud upon the subscribers from an equitable point of view, accompanied by what they might treat as damage. For it is only by virtue of the innocent subscribers' position and the promoter's invitation that the corporation has any pretense for a standing in court. If the promoters after starting their scheme had sold their stock before any subscriptions were taken, and then the purchasers of their stock with notice had invited the public to

come in and it did, we do not see how the company could maintain this suit. If it could not then, we do not see how it can now.

But it is said that from a business point of view the agreement was not made merely to bind the corporation as it then was, with only forty shares issued, but to bind the corporation when it should have a capital of $3,750,000; and the implication is that practically this was a new and different corporation. Of course, legally speaking, a corporation does not change its identity by adding a cubit to its stature. The nominal capital of the corporation was the same when the contract was made and after the public had subscribed. Therefore what must be meant is, as we have said, that the corporation got a new right from the fact that new men who did not know what it had done had put in their money and had become members. It is assumed in argument that the new members had no ground for a suit in their own names, but it is assumed also that their position changed that of the corporation, and thus that the indirect effect of their acts was greater than the direct; that facts that gave them no claim gave one to the corporation because of them, notwithstanding its assent. We shall not consider whether the new members had a personal claim of any kind, and therefore we deal with the case without prejudice to that question, and without taking advantage of what we understand the petitioner to concede.

But, if we are to leave technical law on one side and approach the case from what is supposed to be a business point of view, there are new matters to be taken into account. If the corporation recovers, all the stockholders, guilty as well as innocent, get the benefit. It is answered that the corporation is not precluded from recovering for a fraud upon it, because the party committing the fraud is a stockholder. *Old Dominion Copper Mining and Smelting Co.* v. *Bigelow*, 188 Massachusetts, 315, 327. If there had been innocent members at the time of the sale, the fact that there were also guilty ones would not prevent a recovery, and even might not be a suffi-

cient reason for requiring all the guilty members to be joined as defendants in order to avoid a manifest injustice. *Stockton* v. *Anderson*, 40 N. J. Eq. 486. The same principle is thought to apply when innocent members are brought in later under a scheme. But it is obvious that this answer falls back upon the technical diversity between the corporation and its members, which the business point of view is supposed to transcend, as it must, in order to avoid the objection that the corporation has assented to the sale with full notice of the facts. It is mainly on this diversity that the answer to the objection of injustice is based in *New Sombrero Phosphate Co.* v. *Erlanger*, 5 Ch. D. 73, 114, 122.

Let us look at the business aspect alone. The syndicate was a party to the scheme to make a profit out of the corporation. Whether or not there was a subordinate fraud committed by Bigelow and Lewisohn on the agreement with them, as the petitioner believes, is immaterial to the corporation. The issue of the stock was apparent, we presume, on the books, so that it is difficult to suppose that at least some members of the syndicate, representing an adverse interest, did not know what was done. But all the members were engaged in the plan of buying for less and selling to the corporation for more, and were subject to whatever equity the corporation has against Bigelow and the estate of Lewisohn. There was some argument to the contrary, but this seems to us the fair meaning of the bill. Bigelow and Lewisohn, it is true, divided the stock received for the real estate now in question. But that was a matter between them and the syndicate. The real estate was bought from Keyser by the syndicate, along with his stock in the Baltimore company, and was sold by the syndicate to the petitioner along with the Baltimore company's property, as part of the scheme. The syndicate was paid for it, whoever received the stock. And this means that two-fifteenths of the stock of the corporation, the 20,000 shares sold to the public, are to be allowed to use the name of the corporation to assert rights against Lewisohn's estate that

will enure to the benefit of thirteen-fifteenths of the stock that are totally without claim. It seems to us that the practical objection is as strong as that arising if we adhere to the law.

Let us take the business point of view for a moment longer. To the lay mind it would make little or no difference whether the 20,000 shares sold to the public were sold on an original subscription to the articles of incorporation or were issued under the scheme to some of the syndicate and sold by them. Yet it is admitted, in accordance with the decisions, that in the latter case the innocent purchasers would have no claim against any one. If we are to seek what is called substantial justice in disregard of even peremptory rules of law, it would seem desirable to get a rule that would cover both of the almost equally possible cases of what is deemed a wrong. It might be said that if the stock really was taken as a preliminary to selling to the public, the subscribers would show a certain confidence in the enterprise and give at least that security for good faith. But the syndicate believed in the enterprise, notwithstanding all the profits that they made it pay. They preferred to take stock at par rather than cash. Moreover, it would have been possible to issue the whole stock in payment for the property purchased, with an understanding as to 20,000 shares.

Of course, it is competent for legislators, but not, we think, for judges, except by a *quasi*-legislative declaration, to establish that a corporation shall not be bound by its assent in a transaction of this kind, when the parties contemplate an invitation to the public to come in and join as original subscribers for any portion of the shares. It may be said that the corporation cannot be bound until the contemplated adverse interest is represented, or it may be said that promoters cannot strip themselves of the character of trustees until that moment. But it seems to us a strictly legislative determination. It is difficult, without inventing new and qualifying established doctrines, to go behind the fact that the corporation remains one and the same after once it really exists.

When, as here, after it really exists, it consents, we at least shall require stronger equities than are shown by this bill to allow it to renew its claim at a later date because its internal constitution has changed.

To sum up: In our opinion, on the one hand, the plaintiff cannot recover without departing from the fundamental conception embodied in the law that created it; the conception that a corporation remains unchanged and unaffected in its identity by changes in its members. *Donnell* v. *Herring-Hall-Marvin Safe Co.*, 208 U. S. 267, 273; *Salomon* v. *Salomon & Co.* [1897], A. C. 22, 30. On the other hand, if we should undertake to look through fiction to facts, it appears to us that substantial justice would not be accomplished, but rather a great injustice done, if the corporation were allowed to disregard its previous assent in order to charge a single member with the whole results of a transaction to which thirteen-fifteenths of its stock were parties, for the benefit of the guilty, if there was guilt in any one, and the innocent alike. We decide only what is necessary. We express no opinion as to whether the defendant properly is called a promoter, or whether the plaintiff has not been guilty of laches, or whether a remedy can be had for a part of a single transaction in the form in which it is sought, or whether there was any personal claim on the part of the innocent subscribers, or as to any other question than that which we have discussed.

The English case chiefly relied upon, *Erlanger* v. *New Sombrero Phosphate Co.*, 3 App. Cas. 1218, affirming *S. C.*, 5 Ch. D. 73, seems to us far from establishing a different doctrine for that jurisdiction. There, to be sure, a syndicate had made an agreement to sell, at a profit, to a company to be got up by the sellers. But the company, at the first stage, was made up mainly of outsiders, some of them instruments of the sellers, but innocent instruments, and, according to Lord Cairns, the contract was provisional on the shares being taken and the company formed (p. 1239). There never was a moment when the company had assented with knowledge of the facts.

The shares, with perhaps one exception, all were taken by subscribers ignorant of the facts, 5 Ch. D. 113, and the contract seems to have reached forward to the moment when they subscribed. As it is put in 2 Morawetz, Corp. (2d ed.) § 292, there was really no company till the shares were issued. Here thirteen-fifteenths of the stock had been taken by the syndicate, the corporation was in full life and had assented to the sale with knowledge of the facts before an outsider joined. There most of the syndicate were strangers to the corporation, yet all were joined as defendants (p. 1222). Here the members of the syndicate, although members of the corporation, are not joined, and it is sought to throw the burden of their act upon a single one. *Gluckstein* v. *Barnes* [1900], A. C. 240, certainly is no stronger for the plaintiff, and in *Yeiser* v. *United States Board & Paper Co.*, 107 Fed. Rep. 340, another case that was relied upon, the transaction equally was carried through after innocent subscribers had paid for stock.

Decree affirmed.